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# Policy

* Basic underlying justifications
  + Moral argument: right to protect the author’s integrity (“copyright is a natural right of property in the creation of a person’s mind”)
  + Economic arguments: encourage dissemination and creation of works through financial incentive of protecting one’s right to distribute it (public interest)

## Why is there CR?

### Moral argument - copyright is a natural right of property in the creation of a person’s mind

### Economic argument – Encourage investment in creation, invention, publication, dissemination

- Copyright should be protected by statute because of its economic benefits, the encouragement of investment in creation, invention and the publication and dissemination of information

## Idea vs Substance

* Protects only substance/expression, not idea
  + *Feist*: cannot protect entries without de facto protecting the idea/information itself

# Historical development of copyright

* Early copyright aimed at protecting literary works, which at the time were reproduced by hand
  + Copying not really an issue, moral rights and fame of author were more of an incentive
* 1500-1700: With introduction of Gutenberg Movable-Type printing press, royal control and regulation of printing for purposes of censorship
* 1710 ***Statute of Anne***: first copyright act which *gave authors sole right of printing works for 14 years from publication* 
  + Part of this was to **prevent publishers from asserting a common law copyright over works indefinitely**
  + We no longer have common law copyright – with statute
  + An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”
* 1800s-1882: UK extends protection to engravings and prints, sculpture, dramatic works, paintings, drawings, musical works, etc.
* Imperial act 1911 enacted to facilitate ***Berne Convention***adherence; **common law copyright repealed**
* **Canada’s copyright development**
  + 1710 – Statute of Anne – 14 years
  + First Canadian copyright act 1868 – required registration (formality)
  + Copyright act 1921 modelled on 1911 Imperial Act (adherence to Berne)
  + 1988 amendments to include computer programs and clarify moral rights
  + 1997 private copying, neighboring rights
  + 2012 – implemented in face of pressure from trading partners

## International Aspects

* ***Berne convention***
  + National treatment, minimum protections (time period), no formalities (no registration or marking requirements allowed)
  + Must protect domestic and foreigners the same way
* ***Universal Copyright Convention 1952*** (not as important any more)
  + Countries that required formalities, shorter term
  + US and USSR had not joined Berne so they did this instead; prior to this they needed to register work as copyrighted before it was actually protected
* ***Rome Convention 1964***
  + Adding protection for neighboring rights (performers, producers, broadcasters, sound recorders)
* ***NAFTA – 1994***
* ***TRIPS - 1996 – WTO countries***
  + Requires compliance with *Berne*
  + Does not require moral rights recognition, just basic minimum copyright protection

## Challenges in Digital Era

* Napster: enabling infringement was considered enough for them to be liable because they know it is being used for infringing purposes
* Amendments in Canada now make services enabling copyright infringement to be held liable for infringement; even just allowing access to software that enables filesharing is considered liable
* Pre-copyright modernization act, parody of you singing a song was illegal; now “mashup” exception allows this type of use
* The internet: made copies impossible to tract. If posted in countries not adhere to copyright laws – then nothing we can do.
* Resources like itune, youtube, legitimate sources – the internet is more and more adhere to copyrights, now we can use internet without infringing copyright.

### Private Copying Regime v1.0 – levy paid on blank audio tape & CD (private use not infringe)

* First attempt to balance copyright holders economic interests with public’s desire to record content for personal use
  + Levy paid on blank audio tapes and CDs, this is redistributed to authors to mitigate the effects of individuals recording personal copies, which is no longer considered infringement
  + Section 80(1) allows copies of musical works for personal use onto an “audio recording medium” for private use of person making the copy
    - Performer’s performance – singing and playing the song
    - Musical work – song itself
    - Sound recording – the production used to produce the final product
  + These are all bundled into music copyright
  + Section 79 defined “audio recording medium” quite broadly as anything that consumers regularly record music onto

### s.80.1-1) mus work 2) performer’s performance mus 3) sound record in audio recording medium

80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of

(a) a musical work embodied in a sound recording,

(b) a performer's performance of a musical work embodied in a sound recording, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied

onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.

### **s. 79:** audio recording medium: sound recording ordinarily used by consum for that purpose.

s.79.

"audio recording medium" means a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium;

### **Apple CA:** CR board not have juris to tariff on digital recorder or memory permanently in it

**Apple CA v Canadian Private Copying College FCA**

* *Apple Canada v. Canadian Private Copying Collective* (2008 FCA 9) confirmed previous decision that Copyright Board does not have jurisdiction to certify a tariff on digital audio recorders or the memory permanently embedded therein
* A digital audio recorder is not an audio recording medium
* E.g. could not certify a tariff on tape recorders, just the tape cassettes

### Digital recorder not medium, and memory is not medium if not embed in audio recorder

*(see EXCEPTIONS below for current law)*

## Copyright Modernization Act

* ***WIPO treaties*** (Copyright treaty, performances and phonograms treaty) – 1996, implemented in **2012** with ***Copyright Modernization Act***
  + Aimed at bringing copyright law into the digital era
  + **Adds right of “making available” (if it is put online but nobody downloads it, it is still copyright infringement)**
    - This is their key contribution

### Key Changes- photo, fair dealing, user generated content, time shifting, tech protection measures

* **Photographs**: repeal of specific provisions of s10 relating to term and ownership – they are now covered by normal copyright
* **Fair dealing** – new exceptions added for parody, satire, and education
* **New exception for user-generated content for non-commercial purposes**
* **New exceptions for making copies for private purposes and time-shifting**
* **Technological protection measures/DRM**
  + **Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures**
  + Does NOT require government to include restrictions on selling or assisting with circumvention of TPMs (see below)

## Technological Protection Measures

* Issues:
  + Arguably goes beyond WIPO treaties
  + Can potentially restrict ability of users to benefit from all exceptions to copyright
  + Potentially *ultra vires*? – federal government has authority to legislate on copyright, but restrictions involving how people can make use of items they own is under property and civil rights, so possibly they are out of jurisdiction
* Two types of TPMs

### Access Control TPM: control access – e.g. US DVD won’t read in Asia

### S.41.1(1)(a) – Prohibition on circumventing Access Control TPM

### Copy Control TPM – Restrict ppl from copying content

### s. 41.1(1)(b) + (c): no one can offer services or selling devices to circumvent TPM (indi can)

**WIPO Treaties:**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law

* Circumvention of access control TPMs prohibited
  + No prohibition on circumvention of copy control TPMs
* Cannot offer services aimed at circumvention of TPMs
* Cannot manufacture, import, sell or provide devices primarily for circumventing TPMs
* **Exception to Circumvention (**but b/c you can’t use a service to do it, probably unrealistic)
  + Enforcement of legislation or national security
  + Interoperability of computer program
  + Encryption research (must notify copyright owner) (41.13)
  + Preventing collection of personal information
  + Computer network security (s.41.15)
  + Perceptual disabilities
  + Broadcasting undertakings for ephemeral recordings
  + Radio apparatus for accessing telecommunications service (unlocking cellphones)
  + Additional exceptions can be prescribed
* **BUT Restrictions on devices and services aimed at circumvention**
  + This essentially eviscerates the idea that you ‘can circumvent’ those protections since you can only do it if you figure it out on your own
  + Cannot manufacture, import, sell or provide services that circumvent
  + Criminal offense with up to 1mil and 5 years in prison if circumvented intentionally
* See ss41 to 41.21 for detailed provisions (not all covered by this course)

### **Damages:** 1) CR infringe 2) CR claim from serv person 3) crim offense 1mill/5 yr jail-commerce

### Digital Rights Management Information – 41.22 can’t remove knowingly, sell distribute

* Cannot remove DRM information knowing this will facilitate or conceal infringement
* Cannot knowingly sell, distribute, etc. where DRM has been removed
* Enforcement by copyright owner
  + Damages for infringement
* S41**.22** (1) No person shall knowingly remove or alter any rights management information in electronic form without the consent of the owner of the copyright in the work, the performer’s performance or the sound recording, if the person knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright or adversely affect the owner’s right to remuneration under [section 19](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec19_smooth).

### Notice and Notice Regime *not yet in force*

* Provisions not yet in force, steps have been authorized to bring them into force
  + Ss 41.25 and 41.26
* Copyright owner can provide notice of infringement to ISP, person who provides digital memory, or information location tool (search engines)
  + Notice gets forwarded to the person who posted the content
* Only remedy is statutory damages $5,000-$10,000 for ISPs that don’t forward on the notices

### Providers of information location tools (search engine) – only injunction available – s.41.27

* + Only remedy is injunction (S 41.27)
  + Exception (not yet in force): CAN be sued where provider receives notification of infringement after the work has been taken down and continues to infringe after 30 days

# Term: Copyright always expires Dec. 31

### 50 years from end of year (DEC 31) in which author died *(CA s6)*

* UNLESS
  + Authorship unknown (ss6.1-6.2)
  + Posthumously published (s7)
* **Joint authors:** end of calendar year of death of last author to die plus 50 years (s9)
* **Work unpublished at death of author**: (if author died after 1997 same as published works)
  + **But where the author died pre**-1997 and the work was posthumously published, there are transitional provisions (s7)
  + **Previously 50 years from publication**

* **Anonymous work / pseudonymous**
  + End of year of first publication plus 50, or end of year of making plus 75, whichever is shorter (s6.1)
* **Photographs**
  + *CMA* made it same as regular works so s6 terms
  + *Previously was different*
* **Cinematographic works**
  + Same as dramatic works unless no dramatic character, in which case from end of year of pub plus 50 to a max of 100 (s.11.1)
* **Crown copyright**
  + End of year of publication plus 50 (s12)
* **Moral rights**: same term as copyright ss14.2, 17.2
  + **When author dies moral rights pass to heir**

**Neighbouring Rights**

* + Performance
    - 50 years from end of calendar year in which first fixation or unfixed performance occurred
    - If fixed in sound recording, 50 years after first fixation in sound recording
    - If sound recording published, 50 years from first publication of sound recording or 99 years from date of performance, whichever is earlier
  + Sound recordings
    - 50 years from end of calendar year in which first fixation occurred
    - If published before copyright expires, 50 years from year of first publication
  + Communication signals
    - 50 years from end of calendar year in which broadcast

# Subsistence of Copyright – S.5

## Basic concepts:

### Protects expression, not ideas

* + - E.g. book on accounting system: the book itself is copyrighted, the system is not so anyone can use it
    - Courts sometimes struggle with the idea/expression dichotomy

### Arises automatically on creation

* + - No formality or registration required
    - Treaties mean virtually international recognition

2: “copyright” means the rights described in:

1. Section 3, in the case of a **work**
2. Sections 15 and 26, in the case of a **performer’s performance**
3. Section 18, in the case of a **sound recording**
4. Section 21, in the case of a **communication signal**

**3(1) For the purposes of this Act,** “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public, or if the work is unpublished, to publish the work or any substantial part thereof…

**5(1) Subject to this Act,** copyright shall subsist in Canada…in every **original literary, dramatic, musical, and artistic work if any one of the following conditions are met:**

1. Author is a citizen or permanent resident in a treaty country
2. Cinematographic work and maker had headquarters or was a citizen of treaty country
3. Published work: first publication occurred in treaty country

* **Exists in any original work as long as entitlement conditions are met** (5(1)(a)(b)(c))
  + Author must be citizen or resident of treaty country OR first publication in treaty country

 **5.** (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

* (a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;
* (b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,
  + (i) if a corporation, had its headquarters in a treaty country, or
  + (ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or
* (c) in the case of a published work, including a cinematographic work,
  + (i) in relation to [subparagraph 2.2(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec2.2subsec1_smooth)(a)(i), the first publication in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, occurred in a treaty country, or
  + (ii) in relation to [subparagraph 2.2(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec2.2subsec1_smooth)(a)(ii) or (iii), the first publication occurred in a treaty country.

## 1. Authorship/Entitlement

### **S.5:** Author is citizen or resident of treaty country or 1st pub in treaty country

* Generally question of fact
  + Generally natural person, except where *CA* deems otherwise
  + Note use of “maker”, “performer”, “broadcaster” for neighboring rights

### S.13(1) Author will generally be the first owner of copyright, but not always

* (ownership and authorship should be treated separately)

### **s.13(3)** work created in course of employment – or k of service, owner is employer

* + **Work created in the course of employment or under contract of service or apprenticeship** has a first owner as employer ss 13(3)
    - But the author is still the individual who created the work
    - Moral rights invested in **author**, and term is by life of **author**
  + Canadian law does not “deem” someone else to be author
    - In contrast to ‘work for hire’ doctrine in states which allows for ‘deemed authors’

### Neudorf v Nettwerk Prod discussed under Ownership/Assignment for what makes an author

## 2. Originality

### 5(1) Subject to this Act, copyright shall subsist in Canada…in every original

literary, dramatic, musical, and artistic work

* Factors that can indicate originality
  + Exercising choice

**U London Press:** Sweat of Brow/so long not copied from another work/no need novel/too low

#### University of London Press v University Tutorial Press (England, Chancery Div. 1916)

**H**: that math exams were sufficiently “original” to attract copyright

**F**: D took portion of math exam and copied it to put into its guide. The D says they are not original and don’t qualify as literary work.

**A:**

* **Original definition (lowest standard):** “sweat of the brow” Lockean standard – subsequently rejected
  + Original does not mean the work must be the expression of original or inventive thought, nor that the form of expression be in original or novel form, but only that **the work not be copied from another work** – it should originate from the author
  + Does not need to be new or novel
  + Time spent is **irrelevant**, as is the fact that it **draws on a common stock of knowledge** or is similar to other math exams
  + Key inquiry: did the work require **selection, judgment, experience**
  + Operates on principle of what is worth copying is worth protecting
  + This case is usually cited for the proposal that labour alone is sufficient as long as it originates with author: cited for the “sweat of the brow” standard
* What is worth copying is worth protecting

### S.2 Compilations & Originality – definition protects Compilation – sweat of brow protects this

S2: “compilation” = work resulting from the selection or arrangement of other works or of data

* Arrangement of pre-existing materials
* Originality **lies in the selection and/or arrangement** not in the underlying works or data themselves; no copyright in facts
* “sweat of the brow” would protect this
  + Problem is that this essentially grants some protection to the facts themselves

#### Tele-Direct v American Business Information Inc (FCC, leave to SCC denied)

NOTE: used the subsequently rejected “creativity” standard

Facts

* Bell Canada provides subscriber information; issues is whether the compilation of individual column listings was original

Held

* **Not original:** for a compilation of data to be original, **it must be a work that was independently created by the author** and **which displays at least a minimal degree of skill, judgment and labour in its overall selection and arrangement**
  + **Court rejects mere sweat of the brow approach and instead applies creativity standard**
* “Author” **implies sense of creativity and ingenuity**
* Protection cannot extend to data itself

### **Feist Pub (US) –** Protect CR compilation if sufficiently original in selection and arrangement

#### Feist Publications v Rural Telephone Service (1991) USSC

Note: uses “creativity” standards rejected in Canada CCH

* Cited for the “creativity” standard of originality
* No copyright in facts, but can copyright compilation if **sufficiently original in selection and arrangement**

Facts

* Feist wants to compile rural directories into one larger directory
* Copied the rural directories – it was clearly copying (include some fake entries included to determine if it was being copied – fictitious entries))

Reasoning:

* + Modicum of creativity is a constitutional requirement in the US 🡪 based on use of the term “author” in the constitution
    - Originality requires that **the author makes the selection and arrangement independently and that it displays some minimal level of creativity**
  + **Rejects sweat of the brow theory as being too low of a standard**
  + If the **selection and arrangement** of the facts are original, those elements are protected by copyright, but does not extend to facts themselves
    - Unless there is only one logical way to really arrange the facts (e.g by surname in this case), and no selective process - this essentially amounts to a copyright on the information if the information can only be expressed in one basic way

Held

* **Sorting a listing of names and information about people is devoid of all creativity so this listing is not subject to copyright protection**
* This case touches on the idea/expression dichotomy – may represent a case where you cannot separate the idea from the expression

### **Feist Rejects** Sweat of Brow – due could extent fact protect, In US med creativity required

### CCH: Ori work not copied and must exercise author’s skill & Judgment (reject Sweat of Brow)

CCH Canadian Ltd v Law Society of Upper Canada – current test (SCC 2004)

Facts

* Law society library allowing copying of judicial decisions, headnotes, judgments, commentary

TEST:

* **To be original:**
  + **Work must not be copied from another work**
  + **Work must be the product of an author’s exercise of skill and judgment** 
    - **Skill =** use of one’s knowledge, developed aptitude or practiced ability in producing the work
    - **Judgment =** use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work
    - Must not be so trivial that it could be characterized as merely mechanical
      * Changing font, fixing grammar and spelling, adding parallel citations
    - This will require intellectual effort
* **Only the expression** must be original, ideas are not protected (para 14), so no need to be ‘creative’, novel or unique
* **Creativity is** **not required for originality (too high) (see *Feist* for example of creativity standard in US**)
  + Suggests work msut be novel or non-obvious
  + This is the US standard but it is applied flexibly
  + Since © protects only the expression or form of ideas, the originality requirement must apply to the expressive element of the work and not the idea (para. 14)
  + It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts
* **Sweat of the brow standard is too low *(closer to*** *University of London Press*)
  + Potentially extends to protection to facts or ideas

### Rationale for Skills & Judgment:

* **Plain meaning of ‘original**’, use of brainpower or skill/judgment seems implicit
* **History of copyright** – work as extension of author’s personality, requirement of intellectual creation to justify
* **Recent jurisprudence** questioning workability and issues with the sweat of the brow standard
* **Purpose of copyright and need to achieve balance**
* **Workable yet fair standard**
  + Note difference with US standard of ‘creativity’, although it is applied as a low threshold so it isn’t clear whether in practice the standard is very different

HELD:

* **Judicial decisions** were not original works produced by the publisher; but the headnotes, annotation, case summaries, topical index etc. **is sufficiently original to attract copyright**

### Development of Requirement

* Possible standards
  + Not a mere copy – pretty low standard
  + Minimal amount of work
  + Minimal requirement of intellectual effort
  + Creativity – problematic because it is hard to define (*Feist, Bell Telephone)*
  + Novelty – problematic because it is workably impossible to know if it is ‘novel’
* *CCH* decision: standard is **must require the exercise of skill and judgment**

**Difference Works at Issue**

* Reported judicial decisions (in their entirety)
  + Court’s reasons for judgment are NOT original works created by the publisher
  + You are reproducing reasoning, not CR,
* Headnotes
  + Is CR, because involves correction to grammar type, selection of skills
* Annotated Criminal Practice
* Case summary
* Topical index
* Textbook
  + Yes
* Monograph (chapter of textbook)

## 3. Fixation – required by court

* Required in some parts of *CA* but has been imposed by courts as a general requirement
  + “computer program”, “dramatic work” (…is fixed in writing or otherwise)
  + “Musical work” formerly required that they be written down, but changed in 1993

### Reasons for Requirement- 1) evidentiary reason 2) CR not protect ideas

* **Evidentiary reason**
  + If something isn’t fixed, it can be difficult to actually analyze whether there is infringement (e.g. if it is just an idea in someone’s head)
* **Copyright does not protect ideas**
  + Partly because copyright does not protect ideas; without fixation, you could try to protect ideas that had not yet been expressed in fixed form violating this balance

### **CCH-** flows form fact that CR only protects express of ideas must also be fixed material form

* + *CCH:* para 8 – “it flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection”
  + *Theberge* – “fixation” distinguishes works capable of being copyrighted from general ideas that are the common intellectual property of everyone (per Binnie J)

**Cdn Admiral:** CR in material form – permanent endurance (but broadcast exception now s.21)

Cdn Admiral v Rediffusion (Exch Ct 1954)

**Facts**

* Rebroadcasting (“rediffusion”) of live sporting events that were not fixed in any form (being broadcast live)
* Not really relevant any more because everything broadcast these days is fixed in some material form

HELD:

* **For copyright to subsist in a work , it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance**
  + Copyright does not protect any spectacle itself (*Sports & General Press Agency v Our Dogs’ Publishing)*
* “Law will not intervene to protect something which is not definite and ascertainable”
* **No copyright in live spectacles, sport matches, parades, processions**
* The rebroadcast would now be dealt with under s21: broadcasters have copyright in communication even without fixation

### Theberge: Fixation disting work capable of being CR from ideas which is common intel of all

Facts: used chemical process to transfer poster prints to canvas reproductions

Held:

* **“Copyright springs into existence as soon as the work is written down or otherwise recorded in some reasonably permanent form”** (binnie)
* **The image ‘fixed’ in ink is the subject matter of the intellectual property**
  + This suggests that the medium is not part of the work
* Even if one were to consider substitution of a new substrate to be a ‘fixation’, **the fact remains that the original poser lives on in the ‘re-fixated’ poster**
  + No multiplication and fixation alone is not an infringement of the original work
* In this case, no multiplication, just making poster into a picture and making more money by selling it that way.
* The IP is the image fixed in the ink that is subject to Copyright, not the ink poster combination.
* The majority says: that layer of ink is the IP, you can remove that ink and without reproducing the ink = no infringe.

### Fixation of Quotations – author vs interviewer, or joint author? If no interviewer never exist

* Some cases hold that interviewer acquires copyright in quotes given by an interviewee by fixing those quotations
* Rationale: if the interviewer did not fix the quotes, they would never have come into existence
  + Didn’t create the words, but did create the circumstances that brought those words into existence
* US: some cases view interview quotes as a work of joint authorship
* Prof thinks It is inconsistent with our idea that author is the originator. Prof thinks US’s way of making quotes are joint authorship is better way to do it.

### Neighboring rights/non-works: Fixation NOT REQUIRED for certain ones! *(s.3(1.1) – telecom, s.15,21 – performer’s performance*

S3(1.1) simultaneous fixation of telecommunications is fixation *(changed after Canadian Admiral)*

* Non-works acquire certain rights without fixation; s15, 21
  + Performer’s performances
  + Communication signals

# Types of works/Subject Matter

* Interpreted broadly, but must fit within one of these categories

## Literary works

### **S.2:** L work includes tables, PC program, compilation/*includes title if original and distinct*

### S2: **“literary work”** includes tables, computer programs, and compilations of literary works

“work” include the title thereof when such title is original and distinctive

* + “**computer program**” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;
  + “**compilation**” means (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data;

### Basic requirements: 1) convey meaning 2) more than mere word or slogan (Exxon)

* **Must convey meaning**
  + Cannot be made up word or scribble
* **Must be more than a mere word or slogan** 
  + *Exxon:* mere creativity and inventiveness in creating the single word does not make it a literary work
    - Giving copyright over a single word gives them too much power without the benefits copyright is designed to provide

### s.2: Work includes original titles, Title is not separate work (Not substant) (Neudorf v Nettwerk)

* Copying of Title is not generally substantial reproduction
* **Titles**
  + **Generally protected if sufficiently original and distinctive; however copying of title not generally a substantial reproduction**
    - “work” includes the title, but the title *by itself* is not a separate work (see definition of work in s2)
    - But, taking a title could in some circumstances be a “substantial taking”, no clear law on this
    - See also *Neudorf v Nettwerk Productions* 
      * Contribution of title not substantial

## What qualifies?

### Math exams - University of London Press

Recall: math exams **are literary works – they are printed or written matter**

* This case stands for the **“lowest standard” of work that has been found subject to copyright** 
  + *Vs Exxon* case where court required that it “impart some substantial amount of intelligible information?
* Are math exams literary works?
  + Includes works expressed in print or writing, irrespective of the question whether the quality or style is high
  + **“literary” seems to be used in a sense somewhat similar to the use of the word “literature” in political or electioneering literature – printed or written matter**

### Accounting Forms - Bulman v One-Write (FCTD 1982)

Background

* Issue was copyrighting forms used for an accounting system

HELD:

* The forms are in a sense communicating, they tell you where to put information and that is **an imparting of meaning or information** (as per *Exxon*)
* So the forms are held to be literary works

### Plots, Scenes and Characters – *Preston v 20th century*

* **Plots, scenes, characters that are clearly defined and well-known enough cannot be copied in a substantial form (in a sufficient level of detail)**
  + **Must be *well-known* prior to the infringement** *(see Preston v 20th Century –* Ewok example)
  + Copyright cannot be limited literally to the text, or a plagiarist could make slight or immaterial variations
  + If these things are copied in a sufficient level of detail, it will be infringement
  + **BUT cannot protect mere ideas or scenes “a faire” with copyright (stock characters, classic scenes, similar setups or plot characteristics)**
    - This can be a fine line, courts try to be flexible to protect author but not to extent to the protection of ideas

### Compilations –s.2.1/BC Jockey Club (race horse list)/Feist (Telephone book)

Definition:

1. a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or
2. a work resulting from the selection or arrangement of data

* Must be ‘literary sense of functionally assisting, guiding, or pointing the way to some end” but no **need to impart intelligible information** (*Bulman v One-Write)*

**2.1** (1) – if compilation consist of more than 1 type of category of work = compilation

* A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the category making up the most substantial part of the compilation.

### Diff b/t Jockey club & Feist: Jockey had original but failed infringement, Feist failed at original

#### BC Jockey Club v Standen (BCCA) -

Facts

* BC Jockey produces a book of information about the race day; the other party used the race booklet information and added his commentary (considerable skill and judgment) and notes then re-sold it to other people
* **Originality** (not an issue)**: The booklet is a novel compilation and the copy was as well, because they reproduced information but arranged it in a certain way to present the information** – **he added substantial skill, knowledge, and experience to produce**

Reasoning

* In **cases of infringement:**
  + Law does not *per se* preclude protection of facts (if the work as a whole is original) if involves “appropriating an undue amount of the material
    - The language employed may be different or the order altered (per *Laddie & Vitoria)*
    - If not protected, then copyright in a compilation would be useless
  + Defendant had taken not only the factual information form the book but also ***the labour and skill which went into the compilation***
    - Some focus given to fact that they created the horse data and compiled it
  + Tries to reconcile with the reluctance to protect information by saying that if too much information is taken it can still be infringement
* “copyright in a compilation may be infringed by appropriating an undue amount of the material, although the language employed e different or the order altered
  + Otherwise copyright in an original compilation would be of little or no value
  + (example of taking the jobs information as cited in the case – took an undue amount of information about the jobs and so is still copyright even though it is just copying from a compilation of information)
  + **Note that here the work was agreed to be original, but the issue was just whether or not there was substantial reproduction** (this is why it is different from the telephone book cases)

* **Note:** mentioned in this case is that if there is a duty to publish, there might not be copyright (e.g. trail judgements = duty to publish so no copyright possibly)
  + So there could be circumstances where the copyright is not valid because it needs to get published

### Collective works- includes encyclopedias/dictionaries/newspaper/magazine

A “collective work” is defined (s. 2) as including reference works like encyclopedias and dictionaries, newspapers and magazines, and any work “written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated”.

* In a collective work there can be different authors, and so differently owned copyrights, for the different parts of the work (cf. s. 14(2)).
* Compare this with a “work of joint authorship”, defined (s. 2) essentially as a work with more than one author in which the contribution of each author is not distinct from that of the others.

## PC Programs (Literary Works) – (Not ICT) – S.2 definition/Apple v Mac

S2**: “Computer program”** means a set of instructions or statements, expressed, fixed, embodied or stored in any manner that is to be used directly or indirectly in a computer in order to bring about a specific result

* Protected as **literary works**
  + Integrated circuit topographies have their own legislation, but it is little used
* **Does not cover the solution to the problem *per se* – this is patent**
  + **Rather it is the way the solution is expressed**
* **Merger Doctrine**
  + If there is only one way to express an idea, then copyright law should not protect that because it would effectively give a monopoly on the idea itself

### Apple v Mackintosh (SCC) – prog embed in chip a reproduction of language protected in CR.

* Issue:
  + Object code burned into chip
  + Direct mechanical copying of a computer program – **is the code still protected when replicated in chip circuitry?**

**HELD:**

* **Programs embedded in the chip are a reproduction of the programs in assembly language and as such are protected by copyright under s3(1)**
  + The program was protected, and **the chip was like an “embodiment in 3D”** of the program, so copying the chip is copying the program
* Recognized copyright in code: takes skill, judgment, and can be done in a variety of ways
  + Now it’s in the act so not at issue

### Delrina– In CA we use Holistic Test: don’t filter out components- protect work on the whole

Delrina v Triolet Systems (CA)

Facts

* Original co-developer of diagnostic program goes off and creates a program that does the same thing as the original

### Holistic Test in CA: 1)Is the work subject to CR, 2) If so, was there substantial part taken

**1) Determine you have an original work: does it *as a whole* qualify for copyright?**

**2) Determine whether it was substantially reproduced**

* + Takes into account the A-C-F type of factors at this stage of the test (the “quality” of what was taken)
* **This is a two-step holistic analysis** (as opposed to taking out all the elements that are not copyrightable and then comparing the results)
  + **ACF used only to determine whether infringement was *substantial***

Held

* The new program was not a copy of the other one to an extent sufficient to be copyright
* It does the same thing, but the program itself is sufficiently different and novel
  + 40/14,000 lines of code were the same; of those:
  + Similarities were dictated by functional requirements (programming conventions, compatibility requirements), common in the community, public domain, interface was functional
* **Can also take into account it was the same programmer so he is likely to do things in a somewhat similar way;** also can draw on programming conventions etc.
* **Note court remarks that the idea/express dichotomy is less strict in Canada resulting in the different use of the test**

### US: Abstraction-Filtration-Comparison Test (Computer Associates v Altai)

This test is used in Canada only to determine **the quality of what was taken for the sake of determining substantial taking** (second step in *Ladbroke* test) (*Delrina v Triolet*) – not for determining whether a program is copyrightable (use a two-step holistic analysis)

* **Used by US courts to determine copyrightability of a program: distinguish between ideas and expression** in the context of computer programs – discussed in Canada in *Delrina v Triolet*
  + **US case: *Computer Associates v Altai* – must separate expression from**
    - Idea
    - Public domain elements
    - Scenes a faire, etc
    - **To isolate what is protectable and compare with what has been copied**

#### Abstraction

* Program’s main purpose (More Abstract)
* System architecture
* Various abstract data types
* Various algorithms and data structure
* Source code
* Object code (Less Abstract)

#### Filtration (Not protected)

* Elements dictated by efficiency
* Idea can only be expressed in one way (MERGER) – not protected
* Functional elements not protected
* Nor elements dictated by external factors
  + scenes a faire, would be included in every treatment of the subject matter, couldn’t write the program without certain components
* Elements in public domain

#### Comparison

* Did defendant copy any aspect of the protected expression?
* What is relative importance of copied section?

Abstraction-filtration-comparison test

* Illustrates tension with respect to how far copyright protection can extend
* Idea/expression dichotomy is fundamental
* Canadian law: do not filter out component elements and decide there is no work left to be infringed
* Guiding notion: over borrowing of author’s skill, labour and judgment

## Dramatic Works

### Dramatic Def: some story/plot, consecutive events, some drama elements, low bar – sell realty

* + Some story or plot, threat of consecutively related events, some aspect of meaning, some basic human influence
  + Some element of drama in the scenes
  + Videos on how to sell real estate have been held to be dramatic works
  + Generally an extremely low bar

### **S.2a-c:** recitation, choreographic work, mime, scenic arrangement, compilation of dramatic work

S2 includes:

1. any piece for recitation, choreographic work or mime, the scenic arrangement…
2. cinematographic work

### **S.11.1:** dramatic chara or not in cinematographic work dictates term (50 yrs or life + 50 yrs)

* + Whether a cinematographic work has a “dramatic character” determines the term of copyright in the work (see s1.11) – 50 years from either author’s life (if it is dramatic character) or 50 years from date of producing the movie (not dramatic character)
    - “Dramatic”; definition
      * Some story or plot, threat of consecutively related events, some aspect of meaning, some basic human influence
      * Some element of drama in the scenes
      * Videos on how to sell real estate have been held to be dramatic works
      * Generally an extremely low bar

1. any compilation of dramatic works
   * Note that courts are generally flexible in allowing works to be considered “dramatic” for the sake of this section, but then it becomes an issue only for cinematographic works (impact on copyright term)

### Canadian Admiral – Live telecast not dramatic work

**I:** were the live telecasts original artistic works

Recall: Live telecast of sport event, not dramatic work (doesn’t meet fixation requirement)

* **Not a dramatic work** (either as a cinematographic production or a work produced by a process analogous to cinematography; or photograph/photography)
  + **Not produced by a process analogous to cinematography so not a cinematographic work**
  + Focusing of light on a film or plate, change produced, image is created, developed, produced as a negative etc.
    - This is now problematic because it might not cover things like digital photography, so use it with care
    - Note the focus on physicality; this is no longer emphasized as much due to digital photography

## Artistic Works – s.2

### s.2: paint, draw, map, chart, plans, photo, engrave, sculp, artistic crafts, architect, compilation

S2: Paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works

“Architectural work” means any building or structure or any model of a building or structure

### Architectural Works

* Historically courts held no copyright in plans for fairly standard home: definition required the buiding ot have an “**artistic character or design”** – this is no longer required
* **Now just uses the “skill and judgment” standard with requirement that “**an attempt has been made to produce *venustas* (beauty) and some originality displayed”
* Ownership of copyright in architectural work is in the author of the plans, not builder or purchaser

The Copyright Act provides a **specific exception to infringement where a photograph or other picture is made of an architectural work, or a work of sculpture or artistic craftsmanship that is permanently situated in a public place or building (s. 32.2(1)(b)).**

# Functional Items

## Instructive Materials (cookbook, dress pattern, tools)

### **Baker v Selden:** CR in book does not protect underlying system

### **Hollinrake v Truswell –** no CR in cardboard pattern for measuring ladies’ dress sleeves

### Cuisenaire v SW Imports – art work must appeal to aesthetic senses, not just incidental appeal

**F:** Multi system developed to teach children math, he tried to say these 241 robs is artistic work, court says: no this is not artistic work – more like utilitarian tool, must appear to the aesthetic senses.

**R:** Artistic work must intend to have appeal to the aesthetic senses, not just incidental appeal

## Useful Items & Utilitarian Tools

### s.64.1(1)(A): not an infringement to copy feature dictated solely by utilitarian function

64.1(1)(a)Not an infringement to copy **features of an article that are “dictated solely by a utilitarian function”**

* Basically prevents copyright on the useful aspects of the article
* **64.1** (1) The following acts do not constitute an infringement of the copyright or moral rights in a work:
* (*a*) applying to a useful article features that are dictated solely by a utilitarian function of the article;
* (*b*) by reference solely to a useful article, making a drawing or other reproduction in any material form of any features of the article that are dictated solely by a utilitarian function of the article;
* (*c*) doing with a useful article having only features described in paragraph (*a*), or with a drawing or reproduction made as described in paragraph (*b*), anything that the owner of the copyright has the sole right to do with the work; and
* (*d*) using any method or principle of manufacture or construction.

### **s.64(2):** If CR useful article, if art reproduced >50, no longer infringement of CR or moral right

64(2) where copyright subsists in a design applied to a useful article…**reproduced in more than 50 copies with authorization from copyright owner**…then it is not infringement for others to reproduce the design subsequently or make drawings of the design

* For practical/policy reasons, do not want to protect functional items for life of author +50 years – this is way too long of a monopoly for something that is useful

**Some useful items are protected:**

* **Graphic designs applied to face of a useful item** (drawing on a water bottle still protected even if more than 50 copies of the bottle are made)
* **Trademarks**
* **Characters (Mickey Mouse) – even if it is a useful thing, like a lamp, producing it will still be infringement (plus 2D-3D infringement)**
* Currently there is still uncertainty in the area of whether jewelry and some other items are actually “useful”

### Cuisenaire v South West Imports

Facts: Coloured rods used to teach children math in conjunction with a book explaining the system

* + Held
    - The rods themselves are not intended **to appeal to the aesthetic senses; rather, they are merely a utilitarian tool** and thus are not works of artistic craftsmanship
    - So using other rods with the program is not infringement

### **Rationale:** don’t want to give life + 50 yrs for useful tools

## Industrial Design Protection – if wants protection for art with utilitarian function

### **Basics:** protect: shape, config, pattern, ornament appeal solely to eye/registration = monopoly

* Characteristics
  + Cheaper, more straightforward, and much faster than obtaining patent protection
    - So can be used to get injunctions or prevent infringement quickly
  + Protects features of the shape, configuration, pattern, ornament etc. that appeal and are judged solely by the eye
  + Monopoly right: make, sell, import, rent
  + System of government registration
  + Apply on a country-by-country basis
  + Limitation period for filing application: one year in Canada (most countries have no grace period)
  + 10-year limited term

### Limitation: 10 years, country by country , 1 yr grace period

### **Apple v Samsung:** major damages given for IDP infringement

* Value
  + *Apple v Samsung* – major damages given to apple for infringement of their user interface in the US (Utility patent and industrial design rights both litigated)
  + Germany – injunction granted against Samsung’s Galaxy tablet based on Apple’s design rights
  + UK – samsung “not cool enough” to infringe Apple’s design
* Contrast with copyright
  + Arises automatically
  + Copyright is generous and forgiving generally
  + No need for registration or approval
  + No limitation period for filing
  + Longer term

### **CR vs IDP:** CR auto right, CR recog in most country, CR no reg, CR no limitation filing, CR long

# Rights Comprising Copyright

**S 3 .(1)**: sole right to1) prod 2) perf in public, 3) pub work or any subst part

S.3.1 include: translate/convert dramatic to novel vice versa/adapt to cinemato/telecomun/rent out Pc Program/rent out sound recording/make first sale of tangible obj/ pub exhibit/authorize others

3.(1) copyright in relation to a work means (this is **exhaustive – these are all and only the rights you get –** *SOCAN*):

* Reproduction right:
  + The sole right to produce or reproduce the work or any substantial part *in any material form whatever* (technological and material neutrality)
* Performance right
  + To perform the work or any substantial part in public, or
* (if work is unpublished, to publish the work)
* Reproduction and performance are *separate rights – if you are a DJ who reproduces and performs others’ work, you will need 2 separate licenses*

**And includes the sole right (these are just examples of the performance/reproduction, not separate rights on their own –** *SOCAN*)

* (a)To translate
* (b)To convert a dramatic work to a novel
* (c)Convert a novel/artistic work to a dramatic work
* (d) to make mechanical contrivance to perform work (sound recording)
* (e) adapt to movie
* (f) communicate to public by telecommunication
* (g) to present at public exhibition, for purpose other than sale or hire, certain artistic works
* (h) to rent out the computer program
* (i) to rent out a sound recording
* (j) to make first sale of tangible object

**And to authorize any such acts**

 **3.** (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

* (a) to produce, reproduce, perform or publish any translation of the work,
* (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
* (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
* (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
* (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
* (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
* (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
* (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
* (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and
* (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

And to authorize any such acts.

### SCC CR Pentaology– 1Tech neutral/2 Balan user & creator/3 no foreign law/4 Q of law less def

*SCC CR PENTAOLOGY 2012-series of 5 decision by SCC regarding CR*

Overarching principles:

* **“technological neutrality”**: the way that you engage in an action should not change the copyright royalties payable
* **Balance rights of users and creators**
  + Users must be able to make use – public domain will remain robust
  + Incentivize creators to produce new works and make available to public
  + Shift towards more focus on “user’s rights”
* **Do not rely on US and foreign law**
  + Particularly where legislation differs
* **Less deference to Copyright Board on questions of law** 
  + Board sets tariffs for copying of various kinds of works; primary customers are collective societies and thus it sides with them much more often than the users; probably means FCCA will engage in more review of copyright board decisions than in the past

## Right to Perform in Public / Communicate by Telecommunication to the Public

### s.3(1) – sole right to perform the work or any substantial part in public

### S.3(1)(f)- In the case of Lit/Dra/mus/art/ to communicate work to public by telecom & auth others

### S.2.4(1.1) – Telecom = make available to mem of pub to have access at place/time indiv chosen

s. 2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes **making it available** to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

### ESA v SOCAN- music DL not commu to pub(DL vStream/no double dip), tech neutral

ESA v SOCAN (2012 SCC):

This decision was crucial for:

1. Music downloads are not considered to be “communications of the work to the public” under s3(1)(f)
   1. Distinction between download and stream
2. Interpreting that the right “illustrated” in the section (f) was an *example* of the “sole right to…perform”, not and **independent or additional right** (so cannot “double dip” rights)
   1. Communication right is connected to the **performance right**, not the right to produce copies
3. Emphasizing **technological neutrality**

* NOTE: *Copyright Modernization Act* – clarifying amendment released after the judgement in this case:
* S2.4(1.1) communication of a work or other subject-matter…to the public by telecommunication…**includes making it available to the public by telecommunication** in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public (doesn’t require actual downloading as long as it is available)

**Background**

* **SOCAN: administers performing rights** (rights to perform in public); other societies deal with reproduction rights (which in that case were already licensed)
* **Wants royalties for musical works downloaded during download of video games**
* Authors were already compensated for the copies (reproduction rights) of the works; SOCAN tries to argue they should also pay royalties for the communication of the work over the internet as a separate item (3(1)(f))

**Reasoning:**

* 3(1)(f) is connected to the **performance right – it is just an illustration of the performance right, not a separate right granted on top of it** 
  + “Means” = exhaustive, “includes” = examples of what it means
* **Technological neutrality**: should not charge royalties differently than in ‘brick-and-mortar’ store
* **Communication right is connected to performance** right, not right to reproduce
  + **Stream vs Download**: different!
    - User is left with permanent copy after download
    - Stream is akin to broadcast or performance
* Rejects prior view from *SOCAN v CAIP (*Tariff 22)
  + There it was held that work has been communicated if user ends up with a new copy of the work that was not there before; court holds this is obiter and does not apply
  + A performance is impermanent in nature, does not leave the viewer/listener with durable copy of work (para 35)
  + Para 42:Now need to slot the enumerated rights into either performance/reproduction

### Tariff 22 – prior view/communicated when user has musical work in their possession at end(rej)

SOCAN v CAIP

### Rogers v SOCAN: “To Public”- openly without concealment to knowledge of all(DL not inclu)

#### Rogers v SOCAN

* **Held: Streaming music to the public is a communication to the public by telecommunication**
* **Public: openly, without concealment, to the knowledge of all**
* Recall: Downloads **do not constitute communication to the public** as per *ESA v SOCAN*
* NOTE: our act now includes “making available” in addition to just communicating

Background:

* Streamed or “rented” songs made available online and can be “pulled” or rented at will (on-demand communication); **this is accepted as a communication**
* **Issue was whether it is a communication to the public**
  + In *CCH*, fax transmissions were not held to be a communication “to the public” (although court left open possibility that a series of repeated transmissions might be)

Held

* **Streams constitute communications of the works**
* **The on demand “pull” communications model is still broadcasting to the public because the works are available in a catalogue to everyone – it is available to an aggregate of members of the public**
  + Any member of public can purchase
  + Business model depends on large number of sales
  + *WIPO Art 8 “right of authorizing any communication to the public…including making available* (now included in our act)
  + *Distinguish from CCH: library has ability to accept or refuse any copy*

## Right to Reproduce or Substantially Reproduce

### Ladbroke Test for infringe repro1) origin work in whole qualify CR? 2) substant repro in quality?

**Holistic consideration of the full work, considering:**

1. **Whether it is an original work: does it *as a whole* qualify for copyright?**
   * wrong to ask whether the part taken by itself is protected
     + i.e. cannot dissect the work
2. **Whether it was substantially reproduced *in quality*  and quantity**
   * Takes into account the A-C-F type of factors at this stage of the test (the “quality” of what was taken) (*Delrina v Triolet*)
   * “substantial” involves quality as well as quantity
     + This is often the most difficult determination
     + Make sure to do a holistic examination of the substantiality of the reproduction
     + Can look to whether what was taken is novel or striking, or merely commonplace

* **Do not dissect the work**
  + As a short cut, *can ask if the part taken would itself be the subject of copyright, but this is only a shortcut*

### Cinar Corp 2013 – holistic substantial reproduction analysis – quality and quantity

Cinar Corp v Robinson (2013 SCC)

* Holistic “substantial reproduction” analysis

Facts

* Copying of TV show idea with similar characters, environment, protagonist, and clear influence on side-kicks; **not a direct copy but clear resemblance**
* Protagonist wears a straw hat and similar glasses

**Substantial Reproduction Analysis**

* Act does not protect every ‘particle of a work’
* ***Ladbroke*: substantiality determined by quality, not quantity; flexible standard**
  + A part that **represents a substantial portion of the author’s skill and judgment** expressed therein
    - **A substantial part in relation to the originality of the work**
    - E.g. he came up with the characters, village, appearance, interactions, etc.
  + **Abstraction-filtration-comparison approach** not really useful for this type of work
    - May be useful test for some works like PC programs
    - But some works do not lend themselves to such an analysis
    - **Do not dissect the work and look at specific aspects; look at the work as a whole**
    - Exclusion of non-protectable elements at outset (what the A-F-C approach does) would prevent holistic analysis
  + Be aware of:
    - Differences between the works do not necessarily indicate independent creation
    - Key inquiry is: **whether the copied features are a substantial part of the plaintiff’s work**
    - **Protect only the expression of ideas, not the ideas themselves!**

**Application**: What was taken included graphic appearance and personality of protagonist, personalities of secondary characters, appearance of makeshift village

* + Are not abstract ideas, but an expression of those ideas, which was a product of the author's skill and judgment

**HELD**:

* What was taken included graphic appearance and personality of protagonist, personalities of secondary characters, appearance of the village
* These are not abstract ideas but are an expression of those ideas, which was a product of the author’s skill and judgment
* General principles affirmed (paras 23-24)
  + Balance of public/author
  + No monopoly over ideas or elements in public domain (desert island, puzzles, etc. are all fine)
  + Act protects expression of ideas in works, not ideas themselves

# Moral Rights

### s.14.1(1) – author right to integri of the work subj to s.28.2. & s.3: associ by name/ anonymous

14.1(1) author has, subject to s28.2, the **right to the integrity of the work** and, in connection with an act mentioned in section 3, **the right, where reasonable, to be associated with the work by name or under a pseudonym and the right to remain anonymous**

* **Paternity** – association by name
* **Integrity** –free from mutilation
* **Moral rights are circumscribed by the requirement of reasonableness 28.2(1): THE MODIFICATION OR USE** must “prejudice its author’s or performer’s honour or reputation”
* NOTE: **moral rights added in 2012 for performers of aural performances** s17.1 (not retroactive)

### s.17.1: performer’s live aural perf subject to integrity, (MR expends to neighboring rights)

* **17.1** (1) In the cases referred to in subsections 15(2.1) and (2.2), a performer of a live aural performance or a performance fixed in a sound recording has, subject to subsection 28.2(1), the right to the integrity of the performance, and — in connection with an act mentioned in subsection 15(1.1) or one for which the performer has a right to remuneration under section 19 — the right, if it is reasonable in the circumstances, to be associated with the performance as its performer by name or under a pseudonym and the right to remain anonymous.

## General characteristics of Moral Right

### s.14.1(2&3): MR cannot be assigned, but can waived/assign CR does not mean waive MR.

* **Cannot be assigned**, but **can be waived in whole or in part and this need not be in writing**: s 14.1(2), 17.1(2)

### s.14.2(1): MR subsist for the same term as CR in work. Life + 50

(1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

### s.14.2(2): work can pass on death to bequeathed/assignment = waiving MR.

(2) The moral rights in respect of a work pass, on the death of its author, to

* (*a*) the person to whom those rights are specifically bequeathed;
* (*b*) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or
* (*c*) where there is no person described in paragraph (*a*) or (*b*), the person entitled to any other property in respect of which the author dies intestate.
  + Can also be **bequeathed or passed intestate**
  + **Generally, an assignment will require waiving moral rights**
* Same term as regular copyright **life + 50**
* **Protection is limited by reasonableness**
  + In civil tradition, seen as extension of author’s personality so more strength in moral rights (common law sees it more as commerce)

## Infringement of Moral Right

### **S.28.1:** infringement is contrary to any MR author or performer or consent

**28.1** Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer’s performance is, in the absence of the author’s or performer’s consent, an infringement of those rights.

### s.28.2(1) – infringed if prejudice of author/perf’s honor or reputation

### Includes: 28.2(1)(a)distorted, mutilated, modified, (b) used in assoc with prod, serv, institution

**s.28.2(2) –** painting/sculpture/engraving deemed infringe if distort, mutilate, mod

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

### s.28.2(3) exceptions: change in location, step taken in good faith to restore/preserve work

(3) For the purposes of this section,

* (*a*) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or
* (*b*) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

**Requirements for infringement s28**.1 and 28.2

1. Painting, Sculpture, or engraving?
   1. Prejudice is deemed to occur s28.3(2)
   2. Must only **prove that there has been any distortion, mutilation, or other modification of the work**
2. **For everything else:**
   1. **Must prejudice honour or reputation**
      1. 28.2(1) The author’s or performer’s right to the integrity of a work or performer’s performance is **infringed only i**f the work or the performance is**, to the prejudice of the author’s or performer’s honour or reputation**
   2. **The work must be**
      1. **(a) distorted, mutilated or otherwise modified; or**
      2. (b) **[Be] used in association with a product, service, cause or institution**

* **Change in location or physical means of displaying it,** steps taken in good faith to **preserve** the work **shall not, alone, constitute distortion, mutilation, or modification** (28.2(3))

### Theberge – MR limited by reasonableness

The transfer of medium of his painting might have been a violation of moral rights, **but you can’t get a pre-judgment injunction for moral right – only economic**

* The focus of CA law is on economic rights
* Moral rights treat work as extension of author’s personality, deserving protection

### Snow v Eaton Center – injunction granted to remove geese ribbons

Background: Flock of geese adorned with ribbons

* Injunction granted to remove ribbons
* The standard practice is to waive moral rights when assign commercial rights

# Neighboring Rights

* Key difference is no right to prevent performance or communication in public of a recording – just right to remuneration! (except telecommunication – do have a right to control that)
* Neighboring Rights are **rights associated with steps taken to disseminate the work**
  + Part of the historical expansion over time of copyright
  + Copyright modernization act also added **moral rights for oral performances, historically no moral rights were associated with neighboring rights**

### Neighboring R: because they relate to particular manifestation of work rather than work itself.

Three groups of rights under the Copyright Act **stem, not from the author’s creation of a work, but from someone other than the author having put the work into a particular form**, either material form, a live performance, or in a broadcast. Because they relate to the particular manifestation of the work rather than the work itself, such rights are really not copyright in the strictest sense, but “neighbouring rights”.

### 3 NR Act favor: 1) sound recorders 2) live performers, 3) broadcasters of comm signals of work

* The three sets of neighbouring rights in our Act are in favour of people who make sound recordings of works, people who give live performances of works, and broadcasters of communication signals.

In the current Copyright Act, **the neighbouring rights stem from the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and the WIPO Performances and Phonograms Treaty.**

**Neighbouring Rights under the Act are summarized:**

**A performer will have a copyright in a performer’s performance (s. 15)**

**The maker of a sound recording will have, as now, a copyright in the sound recording (s. 18).**

Both a performer in and the maker of a sound recording will have a **right to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication (s. 19).** **This is not labelled a copyright because there is no exclusive right to perform or communicate the recording; other people can do that without permission from these parties.** (Compare the position of the owners of the musical or literary copyright in the work being performed). **They do have the exclusive right, under s. 3(1), to authorize the work to be performed in public or communicated to the public by telecommunication**. A broadcaster (see the definition in s. 2) has copyright in the communication signals (also defined in s. 2) that it broadcasts (s. 21).

## Performer’s Performance s.15 (1)

### S.2 Performer’s performance: live perform – pre-existing art, drama, music, live reading L work

s. 2. The definition includes live performances of pre-existing artistic, dramatic or musical works, live readings of a pre-existing literary work, and live improvisation of any kind of work, whether or not it is based on a pre-existing work. As an example of the latter, a law professor’s extempore lecture is included. 🡪 really means live in this context

S 15 (1): Performances **in Canada or Rome convention country**, fixed in sound recording by Canadian maker or broadcast here (or Rome Convention/WTO country as per *s26*)

* In order to enjoy the work, needs to performed, brought alive – this is the theoretical justification

S19

* Right to remuneration
  + **Cannot stop performance in public but has a right to be paid for it (license)**
  + For performance or communication to public by telecommunication

### **s.15 (1)** a performer has a copyright in the performer’s performance:

### **a) If not fixe**d (broadcast: right to telecom to public, perform in public, to fix in material form

They essentially get a right of ‘first fixation’

* **Right to communicate to public by telecommunication**
* **To perform in public by non-broadcast telecommunication**
* **To fix in any material form**

### b) If fixed – right to reproduce1)unauthorized fixation,2) unauthorized use,3) rent out 4) author

* **Right to reproduce even unauthorized fixations**
* **To reproduce unauthorized uses of authorized fixation**
* **To rent out**
* **And sole right to authorize such acts**

### **s.15(1.1)** – not some additional rights if in CA and fixed

S15(1.1) Performances is **Canada,** fixed in sound recording or broadcast here

* Same as above, **plus**
* **To make available to the public and telecommunicate to them**
* **To make the first sale of a tangible object (as long as not previously sold with authorization either in or outside Canada)**

## Sound Recordings (Maker’s right)-s.18

### **s.18:** right to 1) pub for 1st time, 2) reproduce in material form, 3) rental 4) sole right to authorize

**S18, right to (or to authorize)**

* Publish for the first time
* Reproduce in any material form
* Rent

S18(1.1) – if fixed by **maker** who is Canadian citizen or first published here, right to make available and first sale

## Right to remuneration – s.19

### **s.19:** 50/50 for perf and maker, no right to restrain public perform/ only right to remuneration

**S19 Right to remuneration** (same as above – can’t stop but gets paid) or communication to public by telecommunication (split 50/50 with performer/maker)

* **19.** (1) If a sound recording has been published, the performer and maker are entitled, subject to [subsection 20(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec20subsec1_smooth), to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for a communication in the circumstances referred to in [paragraph 15(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec15subsec1.1_smooth)(d) or [18(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec18subsec1.1_smooth)(a) and any retransmission.

###### Right to remuneration — Rome Convention country

(1.1) If a sound recording has been published, the performer and maker are entitled, subject to [subsections 20(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec20subsec1.1_smooth) and [(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec20subsec2_smooth), to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for

* + (a) a communication in the circumstances referred to in [paragraph 15(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec15subsec1.1_smooth)(d) or [18(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec18subsec1.1_smooth)(a), if the person entitled to the equitable remuneration is entitled to the right referred to in those paragraphs for that communication; and
  + (b) any retransmission.

###### Royalties

(2) For the purpose of providing the remuneration mentioned in this section, a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

* + (a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or
  + (b) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

###### Division of royalties

(3) The royalties, once paid pursuant to paragraph (2)(a) or (b), shall be divided so that

* + (a) the performer or performers receive in aggregate fifty per cent; and
  + (b) the maker or makers receive in aggregate fifty per cent.

###### Deemed publication — Canada

**19.1** Despite [subsection 2.2(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec2.2subsec1_smooth), a sound recording that has been made available to the public by telecommunication in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public, or that has been communicated to the public by telecommunication in that way, is deemed to have been published for the purposes of [subsection 19(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec19subsec1_smooth).

## Communication Signals – s.21

S2: “communication signal = radio waves transmitted through space without any artificial guide, for reception by the public” (**excludes a cable signal)**

### s21: Right to fix it/reprod unauth fix/auth simul retransmit/perf TV broadcast in public for fee

* Fix it
* Reproduce any unauthorized fixation
* Authorize simultaneous retransmission
* Perform TV broadcast in public for an entrance fee

# Term- s.23 for neighbouring rights

### **S23(1):**Performance: 50 yrs end of calendar yr first fixed or unfixed performance occurred/if fixed in sound recording = 50 yrs after first fixation/if sound recording pub – 50 yrs from first pub or 99 yrs from performance which ever first

* + **Performance**
    - 50 years from end of calendar year in which first fixation or unfixed performance occurred
    - **If fixed in sound recording,** 50 years after first fixation in sound recording
    - **If sound recording published**, 50 years from first publication of sound recording or 99 years from date of performance, whichever is earlier

s.23(1.1) – sound recordings – 50 yrs end of calendar yr from first fixation occurred, if pub before expire=50 yrs from end of calendar yr of first pub

* + **Sound recordings**
    - 50 years from end of calendar year in which first fixation occurred
    - If published before copyright expires, 50 years from year of first publication

s.23(1.2) – 50 yrs from end of calendar yr in which broadcast

* + **Communication signals**
    - 50 years from end of calendar year in which broadcast

# Ownership & Authorship

AUTHORSHIP SEE ALSO “authorship” under **subsistence of copyright**

## Ownership s13

*S. 13.(1)*- author is first owner of CR s.13.(3) CR made in course of employment = employer

* **Author is first owner unless work is made in course of employment under contract of service**
  + If employment or under contract of service, then the employer is the first owner

### CR modernization act: photographers now have same first ownership rights as other artists

* + Previously, had rule about commissioning photos and ownership – copyright modernization act got rid of this exception so photographers now have same first ownership rights as other artists
  + 32.2(1)(f) allows for private reproduction of photos for personal use (unless photographer says otherwise) even if first copyright is owned by the photographer (but photographers often contract out of this)

## Assignment – s.13(4)

### s.13(4)Owner may assign or license, but assignment must be **in writing, signed by owner**

* + No exceptions:
    - No oral assignment
    - Fact that something was purchased does not transfer copyright ownership
    - Commissioning something does not equate to copyright ownership in that thing

### s.14.1(2) cannot assign moral rights

* + Recall moral rights cannot be assigned, but may be waived (need not be in writing) (s14.1(2))
* Different rights can be assigned to different owners (e.g. performance, reproduction, fixation etc)

### **London U Press:** can’t legally transfer future work rights/equitable assign enforce upon creation

* **Cannot legally transfer rights in a future work, agreement to assign future work is an equitable assignment** (*London University Press*)
  + Equitable assignment: no legally enforceable transfer prior to creation of the work, **but does give the right to request copyright after the work is created**

### **s.57(3)** unregistered assign are void against subsequent registered assignments

**Note that unregistered assignments are void against subsequently registered assignments** as per 57(3) – this would only apply if you assigned the same rights twice, though

### s14 Revisionary Right- rights reverts to author’s estate 25 yrs after death(if 1st owner/no will)

S14: Where author is first owner of copyright, **no assignment/grant made otherwise than by will is effective beyond 25 years from death of author**

* Paternalistic provision with two justifications:
  + 1) Author might make an improper decision to assign rights during lifetime, assigning rights against interests of heirs
  + 2) Might not know real value of the work during their life, so it is intended to return some of the benefit of increase in value to the heirs

## Owner of cinematographic/sound recording

### s.2 maker cinematographic: ppl by whom undertake arrangements necessary for making the work

Author of **cinematographic work undefined**

* + **Producer or director or both**
  + **See s2 “maker” person by whom arrangements necessary for the making of the work are undertaken**
    - **Can be the production company**
  + S11.1 provides different term if dramatic character vs no dramatic character
    - Idea is that for dramatic character there was human intervention and creativity involved (control production, choose which shots to include, how to shoot them, etc.) – this dramatic character justifies the longer copyright?

### s.2 Maker of sound recording: person who made arrangement necessary for 1st fixation

* **“maker” of sound recording = person who made arrangements necessary for first fixation**

## Ownership and Enforcement

### s.41.23(1): any ppl/ owner deriving rights, interest by assignment/grant in writing – can enforce

**41.23** (1) Subject to this section, the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of that right, title and interest, is entitled to the remedies provided by this Act.

### s.41.23(2): if 41.23(1) not taken by owner, CR owner shall be made a party to proceedings

(2) If proceedings under subsection (1) are taken by a person other than the copyright owner, the copyright owner shall be made a party to those proceedings, except

* (a) in the case of proceedings taken under [section 44.1](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec44.1_smooth), [44.2](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec44.2_smooth) or [44.4](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec44.4_smooth);
* (b) in the case of interlocutory proceedings, unless the court is of the opinion that the interests of justice require the copyright owner to be a party; and
* (c) in any other case in which the court is of the opinion that the interests of justice do not require the copyright owner to be a party.
* Ownership is important when considering enforcement issues
  + Legal owners must be **joined as parties to any action**
    - **See section 41.23(2) of the *Copyright Act***
  + Problematic if author cannot be located
  + Therefore very important to obtain proper written assignment of rights

### U of L Press- test IC– Power to select/dismiss/wages/exclusive serv/place/control (equit assign)

University of London Press

**F:** Math exams prepared by examiners

* Examiner assigned before work is done
* Are examiners or the university of London
* Improper assignment (equitable)

Recall: math exams copyrightable, definitely copied, issue here is whether the people involved were “owners” of the copyright

**Determining employee or not for purpose of assignment** (contract of service/contract for service)

* Servant: person who is subject to the commands of his master as to the manner in which he shall do his work **(control test)**
  + **Not in this case:** examiners paid lump sum to set exam; how this was accomplished was left to their discretion

#### Test: Employee or Contractor?

* **Control test does not work well for skilled employees; can consider consider:**
  + Indicia **of contract for service** include:
    - Power of selection
    - Power of dismissal and suspension
    - Payment of wages
    - Right to exclusive service
    - Right to determine place of work and nature of work
    - Provision of tools and equipment
    - Degree of independence of the person (set times, or freedom to do work as they wish)
    - Place where services are rendered

### Modern employment test: 1) entrepreneur test 2) integration/organization test 3) distinct role

* **Modern tests look at more factors**
  + Entrepreneur test: is employee in business for his own account?
    - Ownership of tools, chance at profit or risk of loss, who hires and pays helpers
  + Integration or organizational test: consider if employee employed as integral part of employer’s business, or only accessory [difficult to apply]
  + Distinguishing roles: ship’s master, chauffeur and reporter on staff newspaper – contract of service; ship’s pilot, taximan, newspaper contributor – contract for services

Held:

* In this case, the authors were independent contractors; they signed a **contract which is an equitable assignment, not a legal assignment** – they were obliged to assign to the Uni
* **Because the authors had not properly assigned ownership, only the two authors present at the hearing could puruse their claims (author must be present if not assigned properly)**

### Remember term is author + 50 yrs (even if owner is not author, still count from author’ life)

* Remember that when employer owns copyright the employee is STILL THE AUTHOR and lifetime +50 is measured by LIFE OF THE AUTHOR not the owner

# Joint Authorship

### *s.2:* join authorship: 1) collaboration of 2+ authors 2) contribution of 1 author not distinct

*S2: “work of joint authorship”*: work produced by the **collaboration** of two or more authors in which the **contribution of one author is not distinct** from the contribution of the other author or authors – cannot separate out the contributions of each author

* Generally **can’t “contract into” being an author**
  + This is a legal question, so even if you contract for remuneration for your contributions, this doesn’t necessarily make you a joint author
* **Author must contribute original expression in a fixed form, not merely ideas or scribing *(Neudorf)***
* Policy:
  + Do not want to give credit to someone as joint author if they **only contributed ideas, not actual content –** do not want to protect ideas using IP law
* Interviews: could potentially be joint authorship because it is the combination of questions and answers, not merely one or the other, that result in the creation of the ultimate work

## *Neudorf* – contribunte mere ideas or suggestion not author(original express in fixed form)

Neudorf v Nettwerk Productions

* **One does not become an “author” by merely contributing ideas or suggestions, nor can one be a “mere scribe”**
  + Author is one who **contributes to the form of the work**
  + Author **is free to accept or reject the mere suggestion of ideas of another**
    - Exercising choice - skill and judgment is being applied to give the work a final form is a good way to distinguish this
    - The author still has total control over what the final product looks like
* 1) just provide idea = not author – he does not decide what to accept
* 2) person giving idea on how to fix = not author
* 3) scribes just writing down = not author – not original

### Test of JA(neudorf) – Contribution be 1) origin exp, 2) significant/substantial (no equal ok) 3) intent to merge, 4) intent to JA

3)

**Joint Authorship Requires:**

1. **Must contribute original *expression,* not merely ideas**

* **Contributes to the form of work; author is free to exercise choice,** accept or reject ides of another

1. **Contribution must be significant or substantial**; does not need to be equal
   * **Significant and substantial** – can consider both **qualitative and quantitative aspect** 
     + **E.g. i**f you contribute a key part of the song, even if only a few bars, could be enough to claim
   * **Can contribution to any part of a musical work**
     + Music, lyrics, and chords; drum parts, bass parts, acoustic parts, electric parts, background part; “hook”
     + Can also be copyrightin the **arrangement of a musical work**, even based on the **re-arrangement of existing music, or in the selection of common, ordinary well-known musical materials**
     + Contribution of significant original expression to **any of these things** can give rise to claim of joint authorship
2. **Intention on the part of the authors that their works be merged so that their contributions are not distinct** (mutual intention)
   * Draws on US collaboration requirement – statute requires collaboration but the term is somewhat unclear
     + US jurisprudence (goes further than our requirements)
       - S101 requires “intention that contributions be merged into inseparable or interdependent parts of a unitary whole”
       - Response to cases that had relaxed the requirement; e.g. one case where a guy wrote music and later someone else wrote lyrics and copyrighted it – they held that he must have intended merging with “something” so it was legit – this was bad so they changed the law
       - Us courts equated intention with collaboration
3. **Intention on the part of the authors to be joint authors** (mutual intention)
   * **Not only must authors intend to merge their contributions, but must also intend that they be considered joint authors – both authors must intend to be a joint author**
     + Does not require that they understand the legal consequences of the relationship
     + Useful test: in the absence of contractual agreements concerning listed authorship, would each participant intend that all would be identified as co-authors?
       - This gives a lot of weight to the subjective beliefs of the “primary author” since she has to intend joint authorship for it to be considered joint
   * Can be “read in” if a work was clearly created by two people and the contributions are **inseparable**

* Intent merge or collaboration **before work is fixed is not sufficient – intent to merge must exist at fixation (need mutual intention)**

### Examples of possible original expression contribution of musical work

* + Lyrics, melody, chords
  + Musical parts, drum parts, bass parts, acoustic parts, electric parts, and background parts
  + The “hook”
  + The arrangement of the work, even if based on the re-arrangement of existing music
  + The selection of common, ordinary well-known musical materials

# Registration/Terms

## Terms

### **S.6: Terms:** Dec 31 the year ofdeath of author + 50 years

### S.9: Joint author terms: Dec 31 the year of the last author to die + 50 yrs

### **s.7:** unpublished work –if dies < 1997: and work published after death 50 years from publication

### **s.6.1:**anonymous works: dec 31 of first publication + 50 yrs or dec 31 make yr+ 75 which shorter

### s.6: photographs: photographer will be author – same as life + 50 yrs

### s.11.1: Cinematographic without dramatic char – dec 31 of pub + 50 yrs or max 100 making yrs

### s.12: crown copyrights: DEC 31 of publication + 50 yrs

### **14.2** (1) Moral rights of a work subsist for the same term as the copyright in the work.

s.17.1(2): Moral rights cannot be assigned, s.17.1(1) right to remuneration

## Benefits of registration

### s.53(1): registration is evidence of particulars entered into it

### s.53(2): certificate of registration is evidence (CR subsists, registrant is owner)

S53(1) registration is evidence of the particulars entered into it

S53(2) certificate of registration is evidence

* + That copyright subsists and
  + The registrant is the owner
  + There is sometimes difficult actually proving that you created a certain thing, so this helps

### S.39(2): registration rebuts innocent infringement defense

Registration **rebuts an innocent infringement defense** (s39(2))

* If someone had legit reason to believe there wasn’t copyright, then you can only get damages not injunctions (or something?)

### s.57(3): registered assignment can be recorded for priority purposes

* Assignments can be recorded for priority purposes (s57(3))
  + Void against subsequent assignee/licensee unless registered
* Note: Registration doesn’t require you to provide a copy of the work, just the information required to register

# Infringement

### s.27(1): infringement to do anything only owner of CR has right to do – s.3 for work, s.15,18 for performer, s.18 – for sound recorder, s.21 broadcaster’s right to communication signal

S27(1) *Copyright Act*: **it is an infringement to do anything only the owner of copyright has the right to do**

* + S3 **for works**
  + S15, 18, **for performer’s rights,**
  + S18 **maker’s copyright** in sound recordings
  + S21 **broadcaster’s copyright in communication signal**
  + S28.1 **for moral rights infringement**

### s.28.1: acts contrary to moral rights are infringe, s.28.2: integrity rights, s.14.1 right to paternity

## Establishing infringement

### Test:1)work as whole is original: CR assumed, reg is evidence

### 2) Ownership: author assumed to be owner (s.34.1), reg is evidence of owner(s.53(2))

### 3) substantial copying (quality– Cinar)/AFC(if relevant – Delrina) – holistic approach

### 4) Access: can be inferred from substantial similarity (feist)

### 5) Causal link: sufficient to satisfy court of no indep creation? (Grignon v Roussel)

**Must Prove that: (*Ladbroke Test as per BC Jockey Club***)

**1) Work *as a whole* is original (attracts copyright)**

* **Note copyright is assumed to subsist unless proven otherwise,** but this does not *per se* mean originality is assumed **(s34.1) (*Grignon v Roussel)***
* **Registration is evidence that copyright subsists s53(2))**

### **s.34.1:** CR presumed subsist, aut presumed owner, if name in work, name presume author/owner

**2) Plaintiff is the owner of copyright in the work**

* Author is assumed to be owner unless proven otherwise (s34.1)
* Registration is evidence that the person registered is the owner **(s53(2))**

**3) Defendant copied a substantial part of the work *in quality* (not quantity) *(cite: Cinar v Robinson)***

* Takes into account ACF factors if relevant (*Delrina v Triolet*)
* “Substantial” – holistic examination, can look at what was taken and whether it is novel or striking, or merely commonplace; **qualitative analysis** (see *Grignon v Roussel)*
* **Perspective is a lay person in intended audience** *(Cinar Corp v Robinson*); **however, experts can assist court with seeing things “not evident to untrained eye”**
* Do **not dissect work!**

**4) Access: can be inferred from substantial similarity (**“surprising similarity without other explanation”)

* + Must have actually copied from the author – i.e. must be a connection between author’s work and defendant work (e.g. Delrina where it was substantially the same but not copied)
  + Could use fictitious entries to help prove copying (e.g. *Feist*, phone book with fake entries – couldn’t possibly be included but for the copying)
* **5) Causal link between the two, sufficient to satisfy court that there was no independent creation? (***this step is discussed in Grignon v Roussel*)
* **Do not dissect the work**
  + As a short cut, *can ask if the part taken would itself be the subject of copyright, but this is only a shortcut*

### Cinar Corp v Robinson (2013 SCC) - *Substantial Reproduction:*

* Holistic “substantial reproduction” analysis

Facts

* Copying of TV show idea with similar characters, environment, protagonist, and clear influence on side-kicks; **not a direct copy but clear resemblance**

**Substantial Reproduction Analysis**

* Act does not protect every ‘particle of a work’
* ***Ladbroke*: substantiality determined by quality, not quantity; flexible standard**
  + A part that **represents a substantial portion of the author’s skill and judgment** expressed therein
    - **A substantial part in relation to the originality of the work**
    - E.g. he came up with the characters, village, appearance, interactions, etc.
  + **Abstraction-filtration-comparison approach** not really useful for this type of work
    - **Do not dissect the work and look at specific aspects; look at the work as a whole**
    - Exclusion of non-protectable elements at outset (what the A-F-C approach does) would prevent holistic analysis
  + Be aware of:
    - Differences between the works do not necessarily indicate independent creation
    - Key inquiry is: **whether the copied features are a substantial part of the plaintiff’s work**
    - **Protect only the expression of ideas, not the ideas themselves!**

HELD:

* What was taken included graphic appearance and personality of protagonist, personalities of secondary characters, appearance of the village
* These are not abstract ideas but are an expression of those ideas, which was a product of the author’s skill and judgment
* General principles affirmed (paras 23-24)
  + Balance of public/author
  + No monopoly over ideas or elements in public domain (desert island, puzzles, etc. are all fine)
  + Act protects expression of ideas in works, not ideas themselves

## Limitation Period

### s.43.1: CR infringe has 3 yrs limit period/time counts when P knew or ought to know infringe

* S 43.1 of the *Copyright Act* 
  + 3 year limitation period for acts of copyright infringement (FROM date the plaintiff learned of the infringement)
  + But discoverability principle applies
    - Time does not start to run until plaintiff knew or could reasonably have known of the infringement
    - E.g. in cases of fraudulent concealment of the infringement

## Possible Defences

### 1) No CR to infringe (no CR subsist – fixation, originality, entitlement etc)/ 2) common source (preston v 20th century fox) 3) alternative explanation for similarity, 4) P not owner or owner not joined 5) fair dealing (CCH), 6) independent creation – complete defence

* **INDEPENDENT CREATION – complete defence**
* **No copyright**
  + Lack of subject matter, fixation, originality, entitlement (not in treaty country, not first fixed in treaty country so no automatic copyright in Canada)
* **Common sources or source material/inspiration** leading to similar product (*Preston v 20th*)
* **Alternative explanation for similarity** (see e.g. *Delrina*), (see also *Preston v 20th*)
  + Programming conventions, code written by same person, similar source code or common code, etc.
* **Plaintiff not author or owner, or not title/assignment** *(University of London Press)*
* **Fair dealing** (viewed as an exception, rather than a defense: see *CCH)*

## Literary Works

* Key issue is **whether the allegedly infringing work substantially reproduces the original** (see above)
* Characters protected **if sufficiently well-developed** and not “classics” (like a bumbling but affable detective)

### **Preston v Century Fox:** 1) proof of no access,2) common sources good (Literary work infringe)

Preston v 20th Century Fox

* **Proof of no access is sufficient to defend against infringement**
* Example of common sources, alt explanation for similarity
* Facts
  + Lucas was sued for copyright infringement in Star Wars by author of a script *Space Pets* which had some similar Ewok characters
* Issues/holdings
  + **No access: policy to send back all uninvited scripts**
  + **Substantial reproduction? NO**
    - **Common sources**: folklore, primitive societies and entities, etc.
    - **Alternative explanation for similarities**
      * Came up with name Ewok when interacting with Newak peoples, etc.
  + **Would average lay observer, recognize the alleged copy as having been appropriated?**
    - Both drew on common sources
  + **Ewok character alone not protected by copyright either**
    - You can have copyright in a character, but in that case it has to be well-known prior to the infringement; in this case, they only became known through star wars, so no infringement
* Remember: independent creation is a complete defence, so insulating a person from external influences is a total defence to copyright infringement

### Computer programs

### Delrina v Triolet – AFC can be useful tool, but don’t abandon holist approach

* Can abstract concepts from source code to look at overall structure of program
  + *But, use* caution in directly applying abstraction-filtration-comparison test, which is a useful tool but cannot replace holistic substantial reproduction analysis (must be holistic, e.g. as per Cinar)

**Factor:**functional& external limitation? Public domain material?programming convention?

* Particular considerations:
  + Functional or external limitations on expression
  + Public domain materials
  + Programming conventions

**Not infringing because there were few similarities and those that were there could be explained**

## Dramatic Works

* Abstraction/f/c originated with dramatic works
* Dramatic work can be protected **even if no literal copying of dialogue occurs**

See: Roy Export Co v Gauthier, Cinar v Robinson

## Musical Works

### Infringe not determined by note to note, by ear or eye, expert evidence

* Not determined by note-by-note comparison, **but is determined by the ear as well as the eye**
  + **Time and rhythm as important as correspondence of notes**
  + **Expert evidence of similarity often used**
* Room for variation in popular music is small
  + **Recognition that small variations may be original (*Grignon v Roussel)***
  + **And similarities may be explained by use of common techniques of composition**

### Grignon v Roussel: if reg after infringement no presumption (s.53(2)), but presume origin (s.34.1)

* Cannot benefit from presumptions given by registration if reg’d after infringement has already taken place
* Infringement found in musical work

Facts

* Wrote a tune, shopped it around, eventually got into defendant’s hands and a close copy was produced with words added but credited the song to someone else
* **Poor man’s copyright -** mailed a copy to himself in a sealed envelope so he could open it on the stand to prove that he had composed it (“poor man’s copyright”)

Held:

* **Evidentiary effect of registration after infringement**
  + **Cannot benefit from presumption in s53(2);** must be registered before the infringement – practically, registration is only useful if it takes place before the infringement
    - **So, originality is not presumed [but found to be present]**
  + **Still benefits from other presumptions** (that it is copyrighted and he is the owner as the author) (34.1)
* **Infringement analysis:**

**1) Does plaintiff own copyright?**

* + - **Yes – mailed himself the cassette to open on the stand**

**2) Is the work original?**

* + - **Yes – notwithstanding the defendant’s expert evidence about similarities to previous works – only small similarities required for popular musical works**

**3) Substantial similarity?**

* + - **At issue was the first eight measures of the songs**
    - **Matter** of **quality not quantity – resemblance** applies “to a significant part of the work” in that it concerns the “hook”
    - YES, it bears a “striking resemblance” and can only be a copy

**4) Access?**

* + - **Yes, the copier had access to the work**
    - Cassette had been left with the defendant so the causal connection is established

**5) Has a causal link been proven? (**to rebut possibility of independent creation?

* **YES: access, plus the similarities and** evidence suggesting the plaintiff’s song was written first all suggest causality
* Liable for infringement

## Artistic Works

### Work in 3D can infringe work in 2D

* Similar principles applied
* Work in 3 dimensions can infringe copyright in 2 dimensional work
* Overlap with industrial design protection
* **Remember: useful items not protected**
  + Many not be infringement of copyright to reproduce a **useful article**
  + **Or to apply features that are dictated solely by a utilitarian function of that article**
  + **See ss64 and 64.1**

### **Note:** Industrial design s.64/64.1

### Theberge – s.38 allows owner to recover possession if infringe economic right only

* A copy is not ‘infringing’ because it violates moral rights – must violate **economic rights** 
  + S38 gives right to recover possession to ‘owner’ rather than ‘author’
  + Also moral rights only added in 1985 while s38 always present
* Modification without reproduction is dealt with as a moral rights problem (minority would have found reproduction in new medium is still reproduction and thus infringement of economic rights)
  + Dicta suggest this change in physical structure containing the work probably not an infringement of moral rights
  + But artist’s name has been removed – potential infringement
  + **Not an economic rights problem**, for pre-judgment seizure needed economic right infringement, and since he didn’t have that he fails
* No reproduction without multiplication

(dissent: change to medium can infringe s3(1) right of reproduction

## Subconscious Copying

### Subconscious copying is possible infringement (because no intent required), but need proof

* No *mens rea* or intention requirement for infringement
* Subconscious copying is a possibility
  + BUT need to show proof (or at least strong inference) of *de facto* familiarity with the work alleged to be copied

### Bright Tunes Music Corp v Harrisongs Music (SDNY 1977) – Subcon copy not defence

* Harrison knew subconsciously that the hook had already worked in a hit song though his conscious mind did not bring it forward when we wrote *My Sweet Lord*
  + Innocent infringement/lack of intent is not a defence

## Secondary Infringement

### s.27(2) one does not make work, but exploits it commercially by sale/distri/exhibit/import

S27(2): someone who **does not make a work but exploits it commercially** by sale, hire distribution, public exhibition, or importation for sale infringes copyright **if he or she knows that the work itself infringes copyright – secondary dealing**

* Note that knowledge is not required for basic copyright infringement but it **is required for secondary infringement** (at least “should have known”)

### **Test:** 1) must have an primary infringe, 2) person knows prim infringe, 3) person 2nd deal

Requirements:

1. **There must be a primary infringement – needs to involve an infringing copy of the work**
2. P**erson must know or should have known that the work is infringing**
   * **Registration** can impute or create a presumption of knowledge (see s39(2))
   * A copyright notice attached to the item establishes knowledge, unless they thought it was a legit copy
   * **Send a letter to provide notice** – sue if they don’t stop
3. M**ust show secondary dealing (i.e. one of the acts enumerated in s27(2))**

* Sometimes hard to go after primary infringers
  + Use secondary infringement to pursue bigger fish; also people who do not make copies themselves but **sell or facilitate infringement by others**

### Roy Export v Gauthier – 2ndary infringe by knowinly renting out cinematographic works (L work)

* Secondary infringement under s27(2) for renting out cinematographic works (Charlie Chaplain films) without permission from copyright holder after being given notice of infringement
* Facts
  + Renting out Charlie Chaplin films that he got from the states, where it was in the public domain, in Canada, where it was still copyrighted
  + So in the beginning he had a good faith basis for doing this
  + But the plaintiff sent him a letter telling him he was infringing copyright and then he kept renting it out (so no longer acting in good faith – this establishes knowledge)

Held:

* **Once the defendant began to act in bad faith knowing the copies were infringing, he was guilty of secondary infringement**

## Expert Evidence – more useful and appreciated by court than TM

* More useful and appreciated by court than in trademark cases, where court feels more comfortable making own determinations
* **Particular use in musical works, cinematographic works**
* **Perspective** is a lay person in the intended audience for the works

### Cinar: SCC affirms importance of expert evidence

* + ***Cinar v Robinson* para 51** – SCC affirms importance of expert evidence to copyright infringement, gives explanation of why it is relevant to copyright
* BUT, there **may be similarities that are not really obvious to the untrained eye** but do contribute to the overall experience of the viewer, and these can be picked up better by experts(E.g. **atmosphere, dynamics, motif, and structure**)
  + So expert role is more to point out these similarities to the court, who then takes it into account in the layperson analysis
* Do not want the perspective for assessing infringement to be a five-year-old child

## Infringement by Importation

S27(2): someone who **does not make a work but exploits it commercially** by sale, hire distribution, public exhibition, or importation for sale infringes copyright **if he or she knows that the work itself infringes copyright or would infringe copyright if it had been made in Canada**

* Also a criminal offense s42(1)(e)
* **Infringed by importing copies that would have been infringing, had they been made in Canada**

### **44.1(2)(c** :special remedies for infringe imports – consent/non-berne or can ask court detain work

**Special Remedies for threat of infringing imports** (works that would infringe if made in Canada 44.1(2)(c))

* Requires:
  + Work must have been produced without consent of copyright owner in jurisdiction where made (44.1(2)(b)(i))
  + OR come from a non-Berne country or non-certified country (5(2); 44.1(2)(b)(ii))
* Canadian copyright owner or exclusive licensee can get a court order (under 44.1(3)) for work to be detained
* Action for judicial determination must be brought subsequently to keep goods detained (prove that conditions in s441(2)(b) and (c) are satisfied as per s44.1(5))
* Spplicant may have to put up security for the order (s44.1(5))

### Kraft Canada v Euro Excellence – exclusive licensee cannot sue owners for infringement

* **Shuts down attempts to limit ‘grey marketing’** through using parallel import legislation (under s27(2)(e))
* Exclusive **licensee cannot sue copyright owners for infringement of its own copyright (**this fails b/c products were made by the copyright owner) ; only an **owner or assignee of copyright can invoke s27(2)(e)**

Background: Kraft had license to exclusively sell Toblerone in Canada, sued a company getting legitimate bars from Europe, Euro-excellence, for importing same good based on the copyright in the logo/design

Held:

* **Only an owner or assignee of copyright can invoke 27(2)(e), since exclusive licensee cannot sue licensor for infringement of own copyright**
* **Does not infringe because they were made by the copyright owner elsewhere (Europe)**
* **Kraft may have breach of contract claim**
* Fractured judgment
  + Some focused on fact that you can’t use copyright in an image on a product to prevent parallel importation
    - But left open possibility that if there were two different copyright owners (rather than licensees) then might have been able to sue

### s.3(1)(j) – now statute **rights of first sale**

* Now see s3(1)(j) *Copyright Act* – rights of first sale

# Authorizing Infringement

### S3 gives the copyright holder the exclusive right to ‘authorize’ listed acts

### **UK approach:** merely supplying means to infringe not enough if no control (Favors public)

* E.g. selling hi-speed dubbing feature not infringement

### Australia: Must take steps to prevent infringement (favors CR) – Moorehouse case

### **CA:** We follow UK – (CCH& Tariff 22) – presumption person authorize in accordance with law

**Authorizing means** to “sanction, approving, or countenancing” (*CCH)* – a strict interpretation

* Photocopiers are ok unless clearly sanctioning infringement (*CCH*)
* Although a filesharing service that only shares infringing files would be authorizing
* Can be infringement if you are sufficiently indifferent

**Requires:**

* More than mere access to infringement tools
* Not infringement to authorize an act that is not direct infringement
* Notices posted warning about copyright **does not constitute** acknowledgement of infringement
* Must exercise **sufficient control** over patrons to be considered authorizing infringement
* Presumption that a person who authorizes does so only as far as is in accordance with the law
* Could be liable if they had sufficient knowledge of acts of infringement and do nothing

Note: similar to UK law; different from Australian (*Moorehouse)* which requires that you take steps to prevent infringement – Canadian courts see this as too protective of copyright holders at expense of public interest in dissemination of information

### CCH – authorize mere access to photocopier not infringement of CR(posted notice, no control)

Background: **Law Society** photocopiers available in the Great Library, with signs posed above them warning about copyright

Held

* **Providing access to photocopiers** (authorizing the “mere use” of equipment) that could be used to infringe does **not infringe copyright**
  + Court assumes that a person who authorizes such activity “does so only so far as it is in accordance with the law”
* **Notice posted about infringement** does not constitute an “express acknowledgement” that the photocopiers will be used illegally; rather it is to remind patrons not to copy
* **Control:** even if there were evidence of infringement, **law society lacks sufficient control over the patrons for it to be considered sanctioning**

### Tariff 22 – presumption person who authorize does so in accordance with law

SoCAN v CAIP (Tariff 22)

Not infringement to authorize an act that is not direct infringement

* Presumption that a person who authorizes does so only as far as is in accordance with the law
* Could be liable if they had sufficient knowledge of acts of infringement and do nothing (*Tariff 22)*

Held:

* Host websites are not aware of the content stored on them – innocent disseminators protected by 2.4(1)(b)
* Caches are automatically created, not under control of owner
* Can infer authorization from acts amounting to a sufficient degree of indifference
  + If ISP has notice it is hosting infringing content, it might be responsible
  + Now we have notice-and-notice regime

## Infringement – communications via internet

s.2 – telecommunication

### s.3(1)(f): telecom is to public – Net commu is public- openly no conceal to all who access

* The statutory framework:
  + s. 2 “telecommunication”
  + s. 3(1)(f) – telecommunication to the public
    - Internet communication is made “to the public” because files made available openly and without concealment, to be conveyed to all who might access

### s.2.4(1)(b) – but person does not infringe by merely provide internet

* + s. 2.4(1)(b) – person does not communicate the work or other subject matter to the public if only act consist of providing the means of telecommunication necessary for another person to so communicate the work
* Consider liability of ISPs for copyright infringement:
  + s. 2.4(1)(b) protects those who serve as intermediaries “Necessary” means reasonably useful and proper to achieve the benefits of enhanced economy and efficiency
  + **Acting as Host server – not liable if no knowledge**
    - **Not liable where no knowledge of content**
    - **But potentially liable for authorizing infringement to the extent ISP has notice of allegedly infringing content**
  + **Caching – content neutral**
    - **Content neutral**
    - **Dictated by need to deliver faster and more economic service**
    - **Therefore is “necessary” and falls within s. 2.4(1)(b)**
    - But embedding hyperlinks that auto lead to a work may infringe
  + Knowledge of infringing nature of content is a factor to consider
  + Consider also the impracticality (technical and economic) of monitoring

### based on s.2.4(1)(b) – ISP protected so long does not engage in acts relate to content

### Host server/caching = ok/content neutral, hyperlink/ knowledge not ok (also is it impractical)?

* + S. 2.4(1.1) – communication to public by telecommunication includes making available for access at a time and place chosen by a member of the public

### *ESA v. SOCAN-* in this case, only stream is communication, not download

### Tariff 22 – no infringe is no knowledge? S.2.4(1)(b)

SOCAN v CAIP

**F: SOCAN sought to impose liability for royalties on ISPs in Canada, irrespective of where the transmission originates**

* + **Various activities at issue:**
    - **Communication of work**
    - **Host server role of ISPs**
    - **Caching**
    - **Hyperlinks (and automatic hyperlinks)**

## How to Determine when telecommunication occurs in CA?

### Test: real and substantial connection test – situs of provider, host server, intermediaries, end user

* + Test is the “real and substantial connection test”
  + For communications on the Internet, consider:
    - * situs of content provider
      * situs of host server
      * situs of intermediaries
      * situs of end user
* Recognize that this results in overlapping jurisdiction
  + “Making available” right could potentially avoid such overlap
* Communication could be in CA or in US
* Just understand – don’t look at host server is located – all factors that connect to the host matters.
* (if just passing through CA – no communication, but if someone receives it, or hosted it = yes communication)

## Providing a Service to Enable Copyright Infringement –s.27

### s.27(2.3) – if prime purpose of provide internet service is to enable infringe CR = infringe

### s.27(2.4) – factors considered: purpose/knowledge/any non-infringe use/ability to limit

* *CMA* makes it infringement to provide a service primarily for infringement: s27(2.3)
* Statutory factors to be considered (s27(2.4)
  + **Promotion for purpose (purpose it is promoted for)**
  + **Knowledge of infringing acts**
  + **Business purpose and economic viability for non-infringing purposes**
  + **Benefits received**
  + **Ability to limit infringing acts**
  + **Significant non-infringing uses**

**SEE ABOVE: authorizing infringement**

## Internet Services

### **s.31.1(1) -** providing Internet access used for infringement is not per se infringement

**Providing internet access used for infringement is not *per se* infringement** s31.1(1)

### s.31.1(2) – caching alone not infringe CR

**Caching excepted: s31.1(2)**

### s.31.1(4) – hosting alone not infringe CR except with knowledge of court decision (s31.1(5))

**Hosting excepted: s31.1(4)**

* **Except where person providing digital memory knows of a decision of a court of competent jurisdiction (s31.1(5))**
  + For takedown by host, must be notice from an actual host that there is infringement

## Information Location Tools – Search engines

* Exception: if content has been removed by the time provider gets notice, limitation not applicable 30 days after notice received

### s.41.27: only injunction relief against provider of info location tool for reprod sm by telecom

**41.27** (1) In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication.

* Exception: if content has been removed by the time provider gets notice, limitation not applicable 30 days after notice received

### Notice and Notice regime – s.41.25/26 not yet in force

S 41.25 and 41.26 **not yet in force**

* Copyright owner can issue notice of alleged infringement to provider, who must forward the notice to the infringing party
* **If provider fails to forward:** only penalty is 5k - 10k fine
* Protects those who provide network services, hosting services, or internet search tools

### Norwich Orders

* **Downloads are not anonymous!**
* Norwich order allows copyright owners to seek order requiring ISP to disclose the identity of customers who are potentially infringing

#### Voltage Pictures v Doe

* **Order requires:**
  + **Bona fide claim: actually has intent to go after the infringer and pursue claim**
    - This is intended to prevent copyright trolling – sending out notices and scaring people into claims with no intent to really sue
  + **Non-party has information on an issue – ISP has the information they want**
  + **Order is the only reasonable means to obtain – can’t get identity of individual any other way**
  + **Fairness requires information be provided prior to trial**
  + **Order will not cause undue delay, inconvenience, or expense to third party**

# Exceptions to Infringement

* *CMA* added numerous new exceptions to infringement
* Broadening in user’s rights both a result of SCC’s more expansive interpretation as well as legislature updating the legislation
  + These exceptions were in part a way to pacify critics of the DRMs and tech protection measure provisions that were included in the bill

## Mash up Exceptions: user generated work post on internet is not infringe

### “Mash-up exception”: 29.21 (non-commercial user-generated content)

Allows creation of new work from previously existing work, personal use, and authorization of an intermediary to disseminate it

**Requires: 29.21**

(a)Non-commercial, user-generated content (s29.21)

* + Non-commercial uses only, but issues with online advertising – is that a commercial use or not?

(b) Source must be mentioned if reasonable in circumstances to do so

(c) Reasonable grounds to believe the existing work non-infringing

(d) No substantial adverse effect with original work

* Allows things like self-made music videos and fan fiction novels
  + You can copy it, members of your household can copy it, but you **cannot authorize another party to copy it**

###### Non-commercial user-generated content

* **29.21** (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if
  + (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
  + (b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
  + (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
  + (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

## Reproduction for private purpose –s.29.22

### s.29.22: origin copy not infringe, original copy legally obtained(not rental), no circumvent TPM,

* + Original copy not infringing
  + Original copy legally obtained, not by rental or borrowing, and individual owns or is authorized to use medium/device onto which it is reproduced
  + Did not circumvent TPM
  + Cannot give reproduction away
  + Use only for individual's private purposes
  + Destroy copies if give away original

## Time-shifting – s.29.23

### S.29.23: if signal received legally, no circumvent TPM, made only 1 copy, keep copy to view

* + Communication signal received legally
  + Do not circumvent TPM
  + Make only one recording
  + Keep recording only as long as reasonably necessary to view at more convenient time
  + Not give recording away
  + Used only for individual's private purposes

## Making backup copies - s. 29.24

### s.29.24: if you own legally can make copy for back up, not circum TPm, no give away,

* + Person who owns or has license to use can make copy solely for backup purposes
  + Source copy is not infringing
  + Did not circumvent a TPM
  + Cannot give reproduction away
  + Destroy all reproductions if person ceases to own or have license to use source copy

# Fair Dealing- s.29, 29.1, 29.2

## s.29 – for research, private study, education, parody or satire

### SOCAN v Bell: sampling music download is research

Step 1 – allowable purpose?

* Yes - previews are for allowable purpose of research
  + First step is low threshold
  + Users are involved in searching and investigation to determine what to buy
  + Research need not be creative – can be for personal interest
  + Dissemination of works in public interest

Step 2 – is it fair

* Purpose – used only for research
  + Streamed, short, low quality
  + Not a substitute for the work itself
* Character of dealing – no permanent copy retained
* Amount of dealing – look at proportion of work (short excerpt, typically low quality), not how many works users preview
* Alternatives to the dealing – no practical alternatives; returns are expensive
* Nature of the work – is of a type that should be widely disseminated
* Effect of the dealing on the work – no competition of preview with download
* Previews actually increase sales
* (But sales do not benefit SOCAN)

### Michelin v CAW: no mention source/name of original work, did not treat work fairly

***Michelin v. CAW***

* + - Michelin failed on trademark issues: no “use”
    - But succeeded on the copyright issues – union infringed copyright by making leaflets

* Court rejected that parody is criticism
  + - * “Criticism” connotes analysis and judgment of another work that sheds light on the original
    - CAW did not mention the source and author’s name
      * “Mention” requires more than passive/implicit acknowledgement
    - Did not treat work in a fair manner (i.e. good faith)
      * “Good faith” = free from discrimination, dishonest, impartial

***Campbell v. Acuff-Rose*** – US case encourages transformative use, new creation

* + - Distinguish transformative work, which supersedes an original, from a derivative work, which includes major components of the original and which infringes

## s.29.1 – for purpose of criticism or review (as long as name of author mentioned)

## s.29.2 – for purpose of news reporting (as long as name/source of author mentioned

## s.29.4 Education – copying for classroom display or examination (s.29.4(2))

* S.29.5 - Educational institutions’ giving student performances of works (
* s.29.6 - Educational institutions’ making temporary copies of news programming for instruction or other programming for consideration as instructional aid (s. 29.7)
* s.30 Educational anthologies including some copyright works among mainly non-copyright matter
* s.30.1Libraries, archives and museums’ making a copy to preserve the original
* s.30.3 Educational institutions, libraries, archives and museums having a photocopier available on their premises, provided warning of copyright infringement is given to the users

**Computer Programs**

Copies of computer programs to adopt the program to the computer, or to back up the program (s. 30.6)

Interoperability of computer programs (s. 30.61)

Encryption research (s. 30.62)

Computer and network security (s. 30.63)

**Incidental and non-deliberate inclusion** of a work or other subject-matter in another work or other subject-matter (s. 30.7)

**Making a copy** of a work to meet the needs of a person with a **perceptual disability** (s. 32)

**Making a copy to fulfill statutory obligations** relating to freedom of information, privacy legislation, other legislation (s. 32.1)

**Making a picture of an architectural work,** or a sculpture or work of artistic craftsmanship permanently situated in a **public place** or building (s. 32.2(1)(b))

**News Reporting**

Publishing by way of news reporting a report of a public lecture (s. 32.2(1)(c))

News reporting of political addresses (s. 32.2(1)(e))

**Public readings** of reasonable extracts from published works (s. 32.2(1)(d))

**Charity**

Non-profit performances of musical works, etc., at agricultural fairs (s. 32.2(2))

Live or recorded performances of musical works for religious, educational or charitable purposes (is infringement, but no liability to pay compensation) (s. 32.2(3))

### Reproduction for private purposes (s29.22)

#### Onto an Audio Recording Medium (blank CD)

S80(1) : it is not an infringement of copyright to copy a musical work or a performer’s performance of a musical work **embodied on a sound recording,** or the sound recording as such, “**onto an audio recording medium [defined in s79] for the private use of the person who makes the copy”**

* This provision is basically out of date but left in so you can still copy blank CDs
* Part of the regime for imposing a levy on manufacturers and importers of blank audio recording media (s81-82)

#### General Exception for Private Copies (added with CMA 2012)

S29.22(1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if…

1. Original copy not infringing
2. The individual legally obtained the copy of the work from which the reproduction is made; **other than by borrowing it or renting it**, and **owns or is authorized to use the medium or device on which it is reproduced** [29.22(2) medium or device – includes digital memory]
3. Did not circumvent TPMs (as per s41) or “cause one to be circumvented”
4. Do not give the reproduction away
5. Used only for private purposes

* Does not apply to CDs (audio recording medium) in the case of musical work embodied in sound recording, performer’s performance in sound recording
* **Must destroy the copy if the original is sold, rented, or given away**

Example: Can take a song off of a CD you legall bought and put it on your ipod

Goals: Trying to make the legislation more tech-neutral and to capture new types of technology

#### Apple Canada v Canadian Private Copying Collective

* Ipod held to be a digital recording medium, and thus cannot put an “audio recording medium” tariff onto it
* Looked at issue of whether an ipod is a digital recording medium; problem is that it is not just the media itself, but the recording thing as well (like putting tariff on a tape player)
* Held that they cannot certify a tariff on digital audio recorders or the memory permanently embedded within
* This result means that it became unclear whether putting copyrighted audio onto an MP3 player is copyright infringement or not – this is solved by the general exception above

### Time-shifting (s29.23)

* Allowed to record for subsequent viewing; not to keep in personal collection forever

Requires

(a) Communication signal obtained legally

(b) Did not circumvent TPM

(c) Does not apply to content received through on-demand services

(d) Make only one recording

(e) Keep recording only a long as reasonably necessary to view at more convenient time

(f) Not give recording away

(g) Used only for individual’s private purposes

### Backup Copies (s29.24)

Requires 29.24

(a) Person who owns or has license to use can make copy solely for backup purposes

(b) Source copy not infringing

(c) Did not circumvent TPM

(d) Cannot give reproduction away

(e) Destroy all reproductions if person ceases to own or have license to use source copy

* + But backup can become source copy if source is destroyed

## Fair Dealing Test

### CCH – 2 step test: 1) Does it fit one of the enumerated purposes, 2) dealing must be Fair (liberal)

* + Large and liberal interpretation
  + Not limited to non-commercial contexts
  + Need not be creative
  + Dissemination of work is in public interest

### CCH: Factors considered to assess fairness: purpose, character, amount, alternatives, nature of work, effect of dealing

* + Purpose of the dealing
    - Must be allowable purpose; commercial use can still be fair
  + Character of the dealing
    - e.g. making single copy and destroying after use
  + Amount of the dealing: taking whole work generally not fair
    - But no per se rule
  + Alternatives to the dealing
    - But do not consider availability of a license as a factor
  + Nature of the work – published or unpublished
    - Publication leads to wider dissemination, but not fair if work is confidential
  + Effect of the dealing on the copyright work
    - e.g. does the copy compete with the market for the original work
* Making a copy for someone else’s fair use is OK

Steps

CCH  
1) purpose: for research – good(important societal purpos), but for commercial purpose (negative0

2) Character of dealing – making only 1 copy (Positive)

3) Amount of dealing – library had discretion to refuse too much work (positive)  
4) alternatives to dealing – license to all journal? But not realistic (positive)

5) Published – should be widely disseminated (positive)

6) Effect – no compettion (postive)

- In the end: positive outweighs negative

### SOCAN v Bell: 2 step test applied here, court don’t like double dip

Step 1 – allowable purpose?

* Yes - previews are for allowable purpose of research
  + First step is low threshold
  + Users are involved in searching and investigation to determine what to buy
  + Research need not be creative – can be for personal interest
  + Dissemination of works in public interest

Step 2 – is it fair

* Purpose – used only for research
  + Streamed, short, low quality
  + Not a substitute for the work itself
* Character of dealing – no permanent copy retained
* Amount of dealing – look at proportion of work (short excerpt, typically low quality), not how many works users preview
* Alternatives to the dealing – no practical alternatives; returns are expensive
* Nature of the work – is of a type that should be widely disseminated
* Effect of the dealing on the work – no competition of preview with download
* Previews actually increase sales
* (But sales do not benefit SOCAN)

### AB v Access CR – found Fair Dealing for teacher to distribute copy to class

***Alberta (Education) v. Access Copyright***, 2012 SCC 37 -

**F:** Copies of short excerpts of textbooks made at teachers’ own initiative with instructions to students that they read the material. Copies made by teacher at request of student were considered to be fair; not at issue here

**A:** Board erred in assessing fairness

* Purpose of the Dealing
  + - Board characterized as instruction or non-private study - unfair
    - SCC: no separate purpose on the part of teacher – symbiotic
* Amount of the Dealing – only short excerpts were copied
  + - Number of copies to be considered under the character of the dealing
* Character of the dealing – multiple copies were distributed to entire classes
* Alternatives to the dealing – purchase of additional supplemental textbooks not a realistic alternative
* Effect on the work – other factors could be blamed for shrinking textbook sales
  + - Board appeared to consider that schools copy a quarter billion textbook pages per year, although a tariff is paid for most

### FULL TEST

#### Copyright subsists in the work

#### Substantial reproduction has occurred (i.e. there is infringement)

#### Must fall into one of the statutory fair dealing exceptions

* + Note: in Canada, unlike US, if not expressly listed in act, does not qualify as fair
* Exceptions:
  + S29: research, private study, education, parody, satire
  + S29.1: criticism or review
    - Provided source and name of author (if given in source) is mentioned
  + S29.2: for purpose of news reporting
    - Must give source and name of author!
  + Other exceptions include educational institutions (s29.4 to 30.4); libraries, archives and museums (s30.1-30.5), and further exceptions (s30.6-32.2)
* **Onus is on defendant** to show it can rely on the exception
* These are exceptions, **part of the balance of ‘user’s rights’** and thus should be given a **large and liberal interpretation** (unfair uses will be caught in the next step)
  + In contrast to old cases which saw these as defences to be construed narrowly (now they are exceptions to be construed broadly)
* **Perspective is that of the user, not copier** (*Access to Education* – student using the copy for private study, not teacher creating it)

#### The use must be **fair**

* Fairness is a **question of fact to be determined in each individual case**
* Factors to consider in assessing fairness: *CCH* (para 53)– this list is **not exhaustive**, other factors can also be considered
  + **Purpose of the dealing**
    - Must be allowable purpose, **commercial use can still be fair** (e.g. research for commercial purposes) – **however, commercial use makes it harder to prove that it is fair** (SOCAN, CCH vs Access copyright)
    - Make a **true assessment of the copier’s actual purpose in making the copy** – differs from the first step above where it is from the perspective of the end user
  + **Character of the dealing** 
    - E.g. making single copy and destroying after use
    - **How many copies, how much copied into each, how much disseminated** (streaming vs hard copy – *SOCAN*)
    - **CCH – specific** single copy sent to specific person upon request
  + **Amount of the dealing: taking the whole work generally not fair**
    - **How much of the work**
    - But no per se rule; e.g. criticizing a photo requires reproduction of the photo, etc.
  + **Alternatives to the dealing**
    - **Other, non-infringing ways to use the work?**
    - But do not consider availability of a license as a factor (fact that D could have gotten a license is not relevant) – you can always get a license for a work, so this would negate all of fair dealing
  + **Nature of the work: published or unpublished**
    - **Publication leads to wider dissemination** so generally encouraged**, but not fair if work is confidential**
    - CCH – judicial decisions – law – this is the type of work we want to be disseminated, to have people exposed to
  + **Effect of the dealing on the copyright work**
    - E.g. does the copy compete with the market for the original work
    - CCH – publisher didn’t provide evidence to support this point
  + **Making a copy for someone else’s fair use is OK**
  + **“Dealing”**
    - Broad term which applies to the general policy not each individual interaction – even if there were some unfair dealings, the overall policies and procedures that dealt with these requests constituted fair dealing

# Damages

### s.41.24: owner can pursue FC or Province court

S41.24 Infringement makes infringer civilly liable in Federal Court or court of province to either **copyright owner (s34(1)) or author if moral rights (s34(2)**

### **s.34(1):** commericial infringe lead to – injuction, damages, accounts, delivery up, and other rem

### **s.**34(2): moral rights to author

**Innocent Infringement - s39(1)** **IF innocent infringement, only injunction is available unless the copyright is registered s39(2)**

### s.35(1): claim damage from loss, or D’s profit(disgorgement)

**May elect either profit/loss or stat damages:**

S35(1) Damages caused to the owner as well as such part of the infringer’s profits not taken into account in calculating the damages [can’t double dip one’s losses and infringers profits, though]

### s.38.1: Statutory damages: 20k per work for commerce purpose,or 100-5k for non comm purpose

S38.1 Statutory damages

* Statutory damages: can be up to 20k per work s38.1(a) for commercial infringement
* *CMA*: $100-$5000 cap for individuals who infringe copyright for non-commercial purposes; plus other plaintiffs cannot sue the same defendant for the other infringements taken place before the action

### S.38(1)(a): right to recover infringed copies

**Right of Recovery**

S38(1)(a) Right of recovery of the copies “as if those copies were the property of the copyright owner” and plates used to produce copies

### Right to costs, post-judgment interests

### s.39: innocent infringe – injunction only remedy (s.39(1), except registered (s.39(2))

### Cinar Corp v Robinson- 600k damages, 1.7 disgorge, psy harm 400k, punitive 1m, cots 1.5m

* Compensatory damages
  + About $600k (not appealed)
* Disgorgement of defendant’s profits (not joint and severally liable, each person is liable for their specific share)
  + $1.7mil
  + Including soundtrack profits because the soundtrack wouldn’t have existed without the defendant’s show (causal connection to the infringement)
* Psychological harm
  + $400k
  + Interesting and unique – not common in copyright law; but the particularly egregious nature of the infringement, denial, and behavior by the defendants were held to justify this; court likens it to a libel case
* Punitive damages
  + $1mil (reduced to $500k)
* Costs on solicitor-client basis $1.5mil

### Personal liability: director/officer can be liable if – deliberate, willful, knowing conduct infringe

* Personal liability
  + Generally a corporation is considered a separate legal entity, so directors and officers not usually personally liable
  + There are some cases where liability can be imposed on a director or officer of corporation: *Cinar Corp* para 60
    - Must be **deliberate, willful, and knowing pursuit of course of conduct likely to constitute infringement**

# Collective Administration – these are societies they reinforce for you

* Very difficult to identify and contact individual copyright owners to seek permission to use a work
  + E.g. DJ – need license to both *copy* and *perform* the music – this is two separate licenses that you will need (plus remuneration to recorders/producers etc)
* Often rights are assigned to collective societies
  + Single point of contact for a person wishing to use any works within the society’s repertoire ; generally have more standardized contracts and whatnot
  + SOCAN – performance rights
* Many different such societies – still a complex task (e.g. still have to go to two different collective societies)
* Plus certain works not included in their repertoire