Copyright CAN (Reynolds’ IP) – Sarah Hannigan

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# INTRODUCTION

Under s5(1) of the *CA*, c’right subsists in every original literary, dramatic, musical, and artistic work if the author was, at the date of making the work, a citizen, subject, or resident of Canada or a treaty country. *Théberge* recognized c’right as a means to achieve a balance between promoting the public interest in encouragement and dissemination of works of the art and intellect and obtaining a just reward for the creator. In essence, the *CA* aims to ensure that authors reap the benefits of their efforts in order to incentivize the creation of new works (*Cinar*). Employing Driedger’s modern approach, courts have interpreted provisions of the *CA* purposively in light of these stated objectives.

# WHAT is COPYRIGHTABLE?

Before determining whether an act of infringement occurred, we first must establish that the work itself is copyrightable. While the *Berne Convention* eliminated the need for registration, fixation and originality are two prerequisites for c’right protection.

## FIXATION REQUIREMENT

The fixation requirement is not expressly set out in the *CA*, but has been demanded and imposed by judicial interpretation. *Can Admiral* provides that a work must be fixed in a tangible form to be capable of c’right protection, and both judgments in *Théberge* recognize fixation either as the means to distinguish c’rightable works from general ideas (Binnie J) or as the fundamental element of reproduction (Gonthier J).

**ORAL STATEMENTS** (*Gould Estate*) 🡪 Oral statements in a speech/interview/conversation aren’t recognized as literary creations and therefore don’t attract c’right protection; there’s no c’right protection for what is said in casual, unplanned conversations

* **Rationale:** If oral utterances were c’rightable, courts would be inundated w/claims from celebrities and public figures—such a result would run counter to the constitutional guarantees of freedom of speech and of the press (*Falwell v Penthouse*)
* **Work-arounds:**
	+ An orator has c’right protection in prepared speeches from structured notes (i.e. ***lectures***)
	+ If a person takes notes or creates a report on the oral statements, then that person obtains c’right in his work

## ORIGINALITY REQUIREMENT

Since s5(1) specifies that c’right subsists in *original* works, we can consider originality to be the gatekeeper of c’right protection. As clarified in *CCH*, the threshold for originality lies somewhere between the “sweat of the brow” theory (applied in *U of London Press*) and the creativity standard (applied in *Feist Publications*). To be original, the creation of the work must involve an exercise of ***skill*** and ***judgment*** that’s more than purely mechanical (*CCH*).

* **SKILL** =use of one’s knowledge, developed aptitude, or practiced ability in producing the work (*CCH*)
* **JUDGMENT** = use of one’s capacity for discernment or ability to form an opinion/evaluation by comparing different possible options in producing the work (*CCH*)

**FACTORS** 🡪 In arriving at her conclusion in *CCH*, McLachlin CJ considered:

* The plain meaning of the word “original”
* History of c’right law—following the French system, c’right protection requires an intellectual creation
* Recent jurisprudence (including US cases) that override the strict application of the “sweat of the brow” theory
* Purpose of the *CA*
* The overarching goal of creating a workable-yet-fair standard—higher than merely the “sweat of the brow” theory, but not so high as to require creativity, which could deprive certain authors of protection

|  |  |
| --- | --- |
| **SUFFICIENT ORIGINALITY** (*CCH*) | **INSUFFICIENT ORIGINALITY** (*CCH*) |
| * Creation of headnotes, case summaries, and topical indices
* Authors must select specific elements of the decision and arrange them in numerous different ways
* Creating headnotes requires knowledge of legal principles + some degree of ***skill*** to arrange facts/info into a comprehensible order
 | * Reports/compilations of judicial decisions alone
* Adding basic factual info + fixing grammar/spelling = purely mechanical changes
* Mere grammatical or stylistic changes (e.g. changing fonts) = purely mechanical
 |

## FACTS & IDEAS

*CCH* and *Feist* make it clear that ***facts*** are not entitled to c’right protection as they owe their origin not to an act of authorship, but an act of discovery—they are unearthed or found, not created.

Similarly, *Kenrick v Lawrence* provides that c’right does not subsist in ideas alone—it’s only the expression of ideas that is subject to protection. Thus, while the use of someone’s idea isn’t an infringing act, copying someone’s expression of his or her idea amounts to an infringement of c’right.

# TYPES of COPYRIGHTABLE WORKS

s2 provides definitions for the literary, dramatic, musical, and artistic works which, according to s5(1), are c’rightable.

## LITERARY WORKS

Literary works constitute a broad range of works expressed in print or writing, irrespective of quality or style (*U of London Press*). As per s2, tables, computer programs, and compilations of literary works are included in this category.

**TOO MINIMAL** (Graham J in *Exxon*) 🡪 Some expressions aren’t eligible for c’right protection because they are *too minimal* to satisfy the requirements of an “original literary work” under s2

* **General rule** (*Exxon*)**:** A title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection—labour alone is insufficient to satisfy originality
* **Rationale** (*Exxon*)**:**
	+ Despite the exertion of time and labour, the mere fact that a word was invented is not in itself sufficient to justify c’right protection
	+ Trademark law already covers this area, and there’s no need for double protection
	+ A single word doesn’t have substance or meaning without other words
* **Exception** (*Exxon*)**:** Some parts of a work might be so qualitatively significant to the work that taking even a small bit of it would be enough to constitute c’right infringement of the work as a whole (e.g. “Jabberwocky”)

**TITLE** (Lord Wright in *Francis Day*) 🡪 Generally, there is no separate c’right in the title of a work—it’s too minimal to warrant c’right protection

* **Exception:**
	+ s2 specifies that a “work” includes its title where the title is ***original*** and ***distinctive***
	+ In certain cases, a title might be so extensive or important so as to be seen as a literary work in itself (*Francis Day*)

## DRAMATIC WORKS

To be entitled to c’right protection, a dramatic work must either:

1. Have a story, thread of consecutively based events either narrated or presented by dialogue and/or action (*Hutton*); **or**
2. Fall within the definition set out in s2: “dramatic work” includes…
3. Any piece of recitation, choreographic work, or mime with its scenic arrangement or acting form fixed in writing or otherwise;
4. Any cinematographic work; and
5. Any compilation of dramatic works

**SPORTING EVENTS** (Linden JA in *FWS Joint Sports*) 🡪 Sporting events aren’t c’rightable as choreographic works

* For the most part, a sporting event is a random series of events—the ***unpredictability*** of the action is inconsistent with the concept of choreography (*FWS Joint Sports*)
* Even though teams may seek to follow the plays planned by their coaches as actors follow a script, what transpires on the field is ultimately something unpredictable—*no one bets on the outcome of Swan Lake* (*FWS Joint Sports*)

**ATHLETIC FEATS** (*NBA v Motorola*) 🡪 Specific athletic feats are not c’rightable

* Even where athletic preparation resembles authorship, a performer who conceives and executes a particular feat can’t c’right it without impairing the underlying competition in the future (*NBA*)
* A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try (*NBA*)

## ARTISTIC WORKS

Artistic works include those which find expression in a visual medium (*DRG*). s2 encompasses paintings, drawings, maps, charts, plans, photos, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations thereof.

**ARTISTIC MERIT** (Reed J in *DRG v Datfile*) 🡪 Artistic merit, the artist’s intention to create “art”, and the actual aesthetic value of the work aren’t pertinent to the question of whether a work falls within this category

* Requiring courts to determine what’s “artistic” is not a “happy situation”

## MUSICAL WORKS

s2 defines musical works as any work of music or musical composition, with or without words, including any compilation thereof. While musical works had to be printed, reduced to writing, or otherwise graphically produced prior to 1993, they no longer have to be in writing to be entitled to c’right protection. The relaxation of this requirement serves to protect a broader range of musical works.

# RIGHTS of COPYRIGHT OWNERS

As per s27(1), it is an infringement for any person to do, without the c’right owner’s consent, anything that by the *CA* only the c’right owner is permitted to do. Thus, to determine whether this is an instance of c’right infringement, we must first look to the economic rights set out in s3, which relate to the author’s ability to profit from or receive the economic benefit from his work. These include **the sole right to produce, reproduce, or perform in public the work or any substantial part thereof**, including the sole right to:

* Produce [3(1)]
* Reproduce [3(1)]
* Perform in public [3(1)]
* Produce… any translation [3(1)(a)]
* Convert dramatic work into non-dramatic work [3(1)(b)]
* Convert non-dramatic work into dramatic work [3(1)(c)]
* To make a sound recording of a literary/dramatic/musical/artistic work [3(1)(d)]
* Reproduce… a literary/dramatic/musical/artistic work as a cinematographic work [3(1)(e)]
* Communicate a work to the public by telecommunication [3(1)(f)]
* Present an artistic work at a public exhibition [3(1)(g)]
* Rent out a computer program [3(1)(h)]
* Rent out a sound recording of a musical work [3(1)(i)]
* Sell or transfer ownership of tangible object [3(1)(j)]
* Authorize any of the above acts [3(1)]

## OWNERSHIP of COPYRIGHT

* **Starting presumption:** The author of the work is the 1st owner of c’right [13(1)]
* **Employment exception:** If the author was employed under a contractof service/apprenticeship, and the work was made in the course of employment, then the person by whom the author was employed is the 1st owner of c’right [13(3)]
* **Assignments and licences:** The owner of c’right may assign the right or grant any interest in the right by licence, but it’s only valid if the grant/assignment is signed in writing by the owner or his agent [13(4)]
* **Exclusive licences:** For greater certainty, it’s always deemed to have been the law that a grant of exclusive licence in c’right constitutes the grant of an interest in the c’right by licence [13(7)]
	+ **Writing requirement:** As per *Robertson v Thomson*, only exclusive licences have to be in writing
* **Reversionary interest:** Where the author is the 1st owner of c’right, and there’s no assignment, the reversionary interest in the c’right expectant on the termination of that period shall, on the author’s death, devolve on his legal representatives as part of the author’s estate and any agreement entered into by the author as to the disposition of such reversionary interest is void [14(1)]
	+ **Essentially:** Even if the author transferred interest in c’right, it will revert back to the author (can’t contract out of this)

## TERM of COPYRIGHT

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| **AUTHOR** | **TERM** | **SECTION** |
| **General** | Life of author + 50yrs from the end of the calendar date in which the author dies | s6 |
| **Joint ownership** (multiple authors) | 50yrs from the end of the calendar year in which the last of the authors dies | s9(1) |
| **Anonymous/pseudonymous works** | Whichever ends earlier:50yrs from the end of the calendar year in which the work was published75yrs from the end of the calendar year in which the work was made | s6.1 |
| **Crown** | 50yrs from the end of the calendar year in which the work was first published | s12 |

## RIGHT to REPRODUCE the WORK

The right to reproduce the work is contained within s3(1) and protects against both literal (exact copying) and non-literal reproduction (creating a work that is substantially the same). This is a *broad* right—s3 was drafted so as to encompass technologies that hadn’t been conceived at the time of drafting (“in any material form whatever”).

**READABILITY** 🡪 A copy doesn’t have to be in human readable form to be characterized as a “reproduction”

* **General rule:** The requirement of *readability* or *appearance to the eye* found in jurisprudence merely requires that there be a method by which the work in which c’right is claimed and the work which is alleged to infringe can be visually compared for the purpose of determining whether copying has occurred (*Apple Computer*: copying silicon chips = reproduction)
* A copy of a copy is still a copy (*Apple Computer*)

**PRODUCING ADDITIONAL COPIES** (*Théberge*) 🡪 Reproduction requires an increase in the number of copies

* **Facts:** ∆ transferred authorized reproductions of π’s paintings from paper to canvas for resale (more profitable for ∆)
* **Held** (Binnie J)**:** Reproduction is the act of producing additional copies—re-fixation alone ≠ infringement of the original work
	+ Reproduction doesn’t occur where literal physical and mechanical transfers result in no multiplication of the work
	+ Re-fixation alone doesn’t increase the number of copies ≠ reproduction ≠ infringement
	+ **Rationale:** Economic rights shouldn’t be read so broadly as to cover the same ground as moral rights
* **Dissent** (Gonthier J)**:** A transfer from one medium to another = new “fixation” = reproduction = infringement of c’right

## RIGHT to PERFORM the WORK in PUBLIC

The right to perform the work in public is contained within s3(1). Since “public” is not defined in the *CA*, case law provides guidance as to what constitutes a public performance of the work.

1. **PERFORMANCE?** 🡪 *Rediffusion* provides that a performance occurs when one causes the work to be seen or heard
* By this definition, it seems as though some **telecommunications** could be said to be performances
	+ *ESA* characterizes telecommunications and performances as being inherently intertwined—the communication right was developed in recognition of digital avenues of performance
	+ However, s2.3 suggests that a telecommunication on its own is not automatically a performance
1. **IN PUBLIC?** 🡪 If the audience considered in relation to the c’right owner can properly be described as the owner’s “public”, then anyone who performs the work before that audience w/o the owner’s consent is infringing (from *Jennings v Stephens*)
* **Analysis:** When determining whether a performance occurred “in public”, *Rediffusion* instructs that the determinative factor is the character of the audience
* **Arguments against infringement:**
	+ Characterize the audience as for ***purely domestic***—as per *Rediffusion*, a performance in a private home where the performance is only given/heard/seen only by members of the immediate household ≠ in public
	+ Analogize with *Duck v Bates*: some domestic or quasi-domestic entertainments may not come within the *CA*
	+ If it’s a telecommunication at issue, rely on s2.3: a person who communicates a work to the public by telecommunication doesn’t necessarily perform it in public
	+ Argue that the performance wasn’t ***without concealment and to the knowledge of all*** (the definition used by the court in *CCTA*)
	+ As per *Rediffusion*, a large number of private performances doesn’t constitute a “public performance”—the *character* of the individual audiences remains exactly the same
* **Arguments for infringement:**
	+ Argue that the performance can’t be said to be for ***domestic purposes*** (as in *Gillette Industries*, for instance)
	+ Liken the location of the performance to the showroom in *Rediffusion*, where the court found that it wasn’t domestic or quasi-domestic in nature
	+ As the court did in *CCTA*, rely on the plain and usual meaning of the words “in public”: ***openly, without concealment, and to the knowledge of all***
* ***Rediffusion*:** Performances in subscribers’ homes ≠ in public, but the showing of the film telecast in the showroom = infringement—the showroom was open to the public and there was nothing of a domestic or quasi-domestic nature
* ***CCTA*:** A radio or TV broadcast *does* amount to a performance of the work in public—this is consistent with the plain and ordinary meaning of “in public”: openly, without concealment, and to the knowledge of all
	+ **Rationale:** This approach takes a realistic view of the impact and effect of technological developments
	+ **Criticism:** This approach seems to be inconsistent with s2.3: a person who communicates work to the public by telecommunication doesn’t necessarily perform it in public…

**CASES CITED in *REDIFFUSION*** 🡪 These may provide guidance in determining whether a performance occurred *in public*

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| **CASE** | **FACTS** | **IN PUBLIC?** |
| ***Performing Right Society v Hammond’s Bradford Brewery***, [1934] UK | Hotel was licensed to broadcast songs “for domestic & private use only”, but a receiving set and loud-speaker made songs audible to visitors | **YES**—hotel made the performance audible to a larger # of persons than would’ve otherwise heard it, including persons outside the domestic circle of the hotel |
| ***Duck v Bates***, [1884] UK | Play was given to nurses and attendants of a hospital, together with the medical men, students, and some of their families | **NO**—the audience was composed of mainly nurses who lived together at the hospital (*domestic or quasi-domestic in character*) |
| ***Harms & Chappel v Martan’s Club***, [1927] UK | Performance at an Embassy Club at which club members and guests were present | **YES**—the club members had the privilege of bringing in other members of the public who happened to be invited |
| ***Performing Right Society v Hawthorn’s Hotel***, [1933] UK | Orchestra trio played in hotel lounge | **YES**—performance was open to any members of the public who cared to be guests of the hotel  |
| ***Performing Right Society v Gillette Industries***, [1943] UK | Factory installed loudspeakers from which broadcast music was heard in various departments (600 workers, but no strangers) | **YES**—performance couldn’t be said to be for domestic purposes (unlike that in *Duck v Bates*) |

## RIGHT to COMMUNICATE a WORK to the PUBLIC by TELECOMMUNICATION

s3(1)(f) contains the right to communicate a work to the public by telecommunication is contained. “Telecommunication”, as defined by s2, encompasses a variety of media technologies including TV, radio, fax, and the internet.

Although *ESA* and *Rogers* characterize this right as a *performance* right (rather than a *reproduction* right), s2.3 provides that a person who communicates a work to the public by telecommunication doesn’t by that act alone perform it in public.

**MAKING AVAILABLE** 🡪 s2.4(1.1) has expanded this right to include making the work 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 person

* **Essentially:** Now, just making the work available may constitute an infringement of this right
* **Common carrier exception** [s2.4(1)(b)]**:** Merely providing the *means* of telecommunication necessary for another person to communicate the work is *not* communicating the work to the public (more about this under **defences**)

**TO THE PUBLIC** 🡪 Generally, communication from one source to a single person ≠ communication to the public (*CCH*)

* **Analysis:** Transmissions must be looked at in ***context***—the universal application of *CCH* would lead to arbitrary and inconsistent results = look to the **facts** of the case and the **aggregate** of the transmissions in light of s3(1)(f)
* **Arguments against infringement:**
	+ In *CCH*, the court held that (fax) transmissions of copies of works to a single individual ≠ communications to the public (≠ infringement)
* **Arguments for infringement:**
	+ McLachlin CJ in *CCH* recognized that a series of repeated (fax) transmissions of the same work to numerous different recipients might constitute communication to the public (= infringement); this was reiterated in *CWTA* and *Rogers*
	+ In *CWTA*, the transmission of ringtones to mobile phones constituted a communication to the public
		- If the wireless carrier were to simultaneously transmit a particular ringtone to all customers who requested it, that transmission would be a communication to the public (consider the recipient in ***aggregate***)
		- It would be illogical to reach a different result simply because transmissions are done 1-by-1 at different times

**BY TELECOMMUNICATION**

* ***When does a telecommunication to the public occur on the internet?***
	+ **Old:** Originally, the communication was said to occur when the content was transmitted from the host server to the end user = *each time the content was accessed/****pulled*** *by the end user* (*SOCAN v CAIP*)
	+ **Now:** s2.4(1.1) indicates that simply making the work available constitutes infringement—doesn’t have to be “pulled”
* ***Who is the person communicating (i.e. infringing s3(1)(f))?***
	+ The person who said to have communicated the work is the person who was the **content provider** (*SOCAN v CAIP*)
* ***Can a single transmission constitute several c’right violations?*****🡪** NO (*ESA*); rationale:
	+ Technological neutrality: the law should apply equally to all forms of technology
	+ The need for consistency with the purpose of c’right
	+ The idea of balance from *Théberge* should be preserved even in the digital context (i.e. creators’ rights are limited)
	+ Having two fees for one activity would be inefficient
	+ The court looked to legislative history that showed the right to communicate was historically connected to the right to perform the work—not the right to download or reproduce digital copies
	+ ***ESA*:** *Does the CA require a 2nd royalty to be paid when video games are downloaded as opposed to sold in stores?* **NO**
		- The internet transmission of copies of video games containing musical works doesn’t constitute a communication to the public
		- Reproduction royalties were already paid for the use of music in video games—delivering the game via internet doesn’t engage a 2nd right

**JURISDICTION** 🡪 Canada can exercise Jx in respect of both telecommunications originating here and abroad if a **real and substantial connection** can be established (*SOCAN v CAIP*)—this position is consistent with international c’right practice

* Internet transmissions: consider the *situs* of the content provider, the host server, the intermediaries, and the end user
* **DISSENT** (LeBel J)**:** The “real and substantial connection” test isn’t appropriate for determining Canada’s Jx wrt internet communications—the **location of the host server** provides more *operational predictability*

## AUTHORIZATION

s3(1) includes the right to authorize any of the acts included within the provision, meaning that one might choose to sue the person ***authorizing infringement*** rather than the direct infringer.

* **Rationale:**
	+ Deeper pocket$
	+ It might not be economically worthwhile to serve every individual infringer
	+ In Canada, limited damages are available
	+ It’s probably easier to target the alleged authorizer (e.g. internet service provider) than every individual infringer

**“AUTHORIZE”** 🡪 According to *CCH*—the leading case on this matter—“authorize” means to “sanction, approve, and countenance”

* **Countenance** = give approval to; sanction, permit; favour, encourage (dictionary definition from *CCH*; aff’d in *SOCAN v CAIP*)
* **Analysis:** Authorization is a question of fact that depends on the circumstances of each particular case (*CCH*)
* **Arguments against finding authorization of infringement:**
	+ **Presumption:** A person who authorizes an activity does so only so far as it’s in accordance w/law (*CCH*; *SOCAN v CAIP*)
	+ A person doesn’t authorize infringement by authorizing the use of equipment that could be used to infringe (*CCH*)
	+ Analogize w/*CCH*:
		- No evidence that the photocopiers were used not in accordance with the law
		- The LSUC’s posting of a notice warning that it wasn’t responsible for acts of infringement didn’t constitute an express acknowledgement that the equipment would be used in an illegal manner
		- In any regard, the alleged authorizer lacked sufficient control over patrons to have authorized infringement
	+ **Policy:** As McLachlin CJ emphasized in *CCH*, we don’t want to shift the balance to far in favour of owner’s rights and unnecessarily interfere with the proper use of c’righted works for the good of society as a whole
	+ **Internet service provider:** ISP is entitled to presume that its facilities will be used in accordance w/law (*SOCAN v CAIP*)
	+ Rely on the idea of balance from *Théberge* and argue that we need to promote the public interest (users’ rights)
* **Arguments for finding authorization of infringement:**
	+ We can ***infer*** authorizationfrom acts that are less than direct or (+)ve, or even a certain degree of ***indifference*** (*CCH*)
	+ **Rebut** the presumption from *CCH* that one authorizes only so far as in accordance with the law
	+ Look for evidence that the equipment/service as used illegally
	+ Rely on the idea of balance from *Théberge* and argue that we need to uphold authors’ rights in the given context
	+ **Internet service provider:** Liability may attach if the activities of the ISP aren’t content-neutral—if the ISP has ***notice***, but fails to take action, it can be found to have authorized infringement (*SOCAN v CAIP*)

## SUBSTANTIAL TAKING

Based on the wording of s3(1), c’right infringement of any kind requires a ***substantial taking*** of the original work. This issue is generally decided by ***quality*** rather than quantity. What constitutes a “substantial taking” is a matter of fact and degree—it’s a flexible notion not limited to words on a page or brushstrokes.

**TEST** (*Cinar*) 🡪*Do the copied features constitute a substantial part of π’s work?*

* **Analysis:** Consider the cumulative effect of the features copied from the work (*Cinar*)
* Need to balance b/w protecting authors and leaving ideas and elements free for all to draw upon
* ***Expert evidence*** may be appropriate in making this determination (but: 🡩cost of proceeding)
	+ ***Mohan* standard** (aff’d in *Cinar*)**:** For expert evidence to be admitted at trials for c’right infringement, it must **(a)** be relevant, **(b)** be necessary to assist the trier of fact, **(c)** not offend any exclusionary rule, and **(b)** involve a properly qualified expert

**EXAM** 🡪 Consider the following factors:

* Quality and quantity of the material taken
* Extent to which ∆’s use adversely affects π’s activities (or diminishes the value of π’s c’right)
* Whether the material taken was the proper subject of c’right
* Whether the taking was an intentional appropriation to save time or effort
* Whether the material taken was used in the same or a similar manner as π’s use

# DEFENCES to INFRINGEMENT CLAIMS

Once a *prima facie* act of infringement is established, the burden shifts to ∆ to establish a defence to c’right infringement.

## DEFENCE of PUBLIC INTEREST

Although not expressed in the *CA*,the defence of public interest is available in proper circumstances against the assertion of Crown c’right.

* **Test:** ∆ must establish that it is in the public interest that the information be disseminated as broadly as possible (*R v Lorimer*)
* This defence failed in *R v Lorimer*, as the FC found insufficient evidence to support the concern that the public was unable to access the information

## DEFENCE of FAIR DEALING

This broad defence allows an individual to use a substantial part of another’s c’righted expression without his/her permission provided that the individual acts in furtherance of certain purposes, the individual acts in a fair manner, and—in some cases—certain attribution requirements are satisfied. The *CA* doesn’t define “fair” nor does it provide definitions for any of the eight fair dealing categories, so the availability of the fair dealing defence is a matter of judicial interpretation. While courts used to interpret these categories narrowly (*Michelin*), *CCH* represents a shift towards a broader interpretation and wider availability. In essence, the defence of fair dealing is now seen as a users’ right—not a loophole of liability (*CCH*).

**FAIR DEALING TEST** (*CCH*) 🡪 The test set out in *CCH* involves 2 steps: we first look at the ***purpose*** of the dealing, then its ***fairness***

1. **Does the dealing fit into one of the eight fair dealing categories?** (these should be given a large & liberal interpretation: *CCH*)
* **Research** [29]
* **Private study** [29]
* **Education** [29]
* **Parody** [29]
* Parody is defined as a musical, literary, or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way (*Michelin*)
* Parody normally involves the humorous imitation of the work of another writer, often exaggerated, for the purposes of criticism or comment (*Productions Avanti*)
	+ The pornographic version of a hit Québec sit-com was denied this defence as the QCCA determined it was motivated by ***commercial opportunism*** (“a crass attempt to gain instant public recognition”)
	+ However, given that this case was pre-*Théberge*, we might see a different outcome now in light of the SCC’s attempt to achieve a balance b/w competing interests
* **Satire** [29]
* **Criticism** [29.1] 🡪 must mention the (a) **source**, and (b) **name** of (i) author/(ii) performer/(iii) maker/(iv) broadcaster
* Criticism requires analysis and judgment of a work that sheds light on the original (≠ parody) (*Michelin*)
* **Review** [29.1] 🡪 must mention the (a) **source**, and (b) **name** of (i) author/(ii) performer/(iii) maker/(iv) broadcaster
* **News reporting** [29.2] must mention the (a) **source**, and (b) **name** of (i) author/(ii) performer/(iii) maker/(iv) broadcaster
1. **Was the dealing fair?** (*CCH* sets out a series of factors that provide an analytical framework; applied in *SOCAN v Bell* & *AB*)
* **Purpose of the dealing** 🡪 Consider ∆’s real purpose or motive in using the c’righted work
	+ Commercial purpose = 🡫fair; charitable purpose = 🡩fair
	+ ***CCH*:** The materials were to be used for the purpose of research and private study = 🡩fair
	+ ***SOCAN*:** Use of previews allowed customers to research and ID musical works for online purchase—purpose was *commercial*, but *reasonable safeguards* were in place (previews were streamed, short, and low quality) = 🡩fair
	+ ***AB*:** The *teachers’* (not students’) motive was to utilize photocopied excerpts in the process of instructing and educating students = 🡩fair
* **Character** **of the dealing** 🡪 Examine how the works were dealt with
	+ Multiple copies of the work being widely distributed = 🡫fair; single copy used for legitimate purpose = 🡩fair
	+ ***CCH*:** Copying a work for the purpose of research on a specific legal topic (not widely disseminated) = 🡩fair
	+ ***SOCAN*:** Users didn’t get a permanent copy—once preview was heard, file deleted from computer = 🡩 fair
	+ ***AB*:** Multiple copies of the same excerpt disseminated to the whole class = 🡫fair
* **Amount of dealing** 🡪 Consider the quantity of the worktaken and the proportion b/w the copy and the entire work
	+ If the amount taken from a work is trivial = unlikely for there to have been infringement in the first place
	+ ***CCH*:** LSUC’s policy ensured that the amount of the dealing w/c’righted works would be reasonable = 🡩fair
	+ ***SOCAN*:** 30sec preview was a modest dealing when compared to purchasing the whole work (4mins) = 🡩fair
	+ ***AB*:** Although excerpts were short, teachers would often return to copy other excerpts from the same books, making the *overall proportion* of copied pages unfair in relation to the entire work over a period of time = 🡫fair
* **Alternatives to the dealing** 🡪 Determine whether the dealing was reasonably necessary to achieve its ultimate purpose
	+ ***CCH*:** Implausible for patrons to only research at the library; lack of resources = 🡩fair
	+ ***SOCAN*:** Audio preview = most practical, economic, and safest way to ensure users get what they want = 🡩fair
	+ ***AB*:** The alternative—buying individual textbooks—seems unreasonable = 🡩fair
* **Nature of the work** 🡪 This factor isn’t determinative, but should be considered
	+ If work hasn’t been published = 🡩fair (could lead to wider public dissemination); if work is confidential = 🡫fair
	+ ***CCH*:** It’s in the public interest that access to legal decisions/resources not be unjustifiably restrained = 🡩 fair
	+ ***SOCAN*:** Unless a customer can locate and ID the work he wants to buy, it won’t be disseminated = 🡩fair
* **Effect of the dealing on the work** 🡪 Not the most important factor, but warrants consideration
	+ If reproduced work is likely to compete with the market of the original work = 🡫fair
	+ ***CCH*:** No evidence that publishers’ markets had been (+)ly or (-)ly affected by the dealing = neutral
	+ ***SOCAN*:** Effect of previews was to *promote* sales of the c’righted musical works = 🡩fair
	+ ***AB*:** There was evidence of a decline in textbook sales, but none that linked the decline to photocopying done by teachers—if no evidence is tendered or if the evidence is insufficient, then the detrimental impact won’t be deemed to have been proven

## COMMON CARRIER EXCEPTION

This defence is applicable in the context of **communication to the public by telecommunication**. s2.4(1)(b) provides that a person who merely provides the means of telecommunication necessary for another person to communicate the work doesn’t, by that act alone, communicate that work to the public. It is not a loophole, but an important element of **balance** struck by the *CA*. *SOCAN v CAIP* is the leading case on this provision.

* C’right owners might opt to sue intermediaries because of their deeper pockets; chokepoints

**NECESSARY** 🡪 In this context, the word “**necessary**” is satisfied if the means are reasonably useful and proper to achieve the benefits of enhanced economy and efficiency (*SOCAN v CAIP*)

* **E.g.** Routers, software connection equipment; connectivity services; hosting and other facilities; services w/o which such communications would not occur; caching (when undertaken for technical reasons)

**CONTENT-NEUTRAL** 🡪Liability attaches when the intermediary ceases to be content-neutral

* So long as the internet intermediary doesn’t itself engage in acts that relate to the content of the communication, but confines itself to providing a “conduit” for info communicated by others, then it will fall within s2.4(1)(b) (*SOCAN v CAIP*)
* **Ask:** *Did the intermediary have actual knowledge of infringing contents?*
	+ Actual knowledge is req’d due to the impracticality of monitoring the vast amount of material
* s31.1 can be seen as a *complementary* defence—it applies more broadly beyond the right to communicate to the public by telecommunication

## PRIVATE COPYING REGIME DEFENCE

Part VIII of the *CA* serves two objectives:

**(1)** to legalize private copying of sound recordings embodying musical works onto audio recording media, and

**(2)** to provide fair and equitable compensation for rights-holders for those copies through a levy on blank audio recording media

**DEFENCE** 🡪 As per s80(1)(a) the act of reproducing all or any substantial part of a musical work embodied in a sound recording onto an audio recording medium for the private use of the person who makes the copy doesn’t constitute c’right infringement

* **Audio recording medium (ARM)** [79]**:** a recording medium onto which a sound recording may be reproduced that is **ordinarily used** by individual consumers for that purpose
	+ **Ask:** *Has it become ordinary practice for consumers to copy music onto X?*
	+ **Certified:** Audio cassettes >40mins; CDs; MiniDiscs
	+ **MP3 players, cell phones, and computers?** 🡪 In 2003, the C’right Board said “yes” = interpret s79 *broadly* so as to include MP3 players, iPods, etc.—if it can store reproductions, then it’s an ARM
	+ **Potential consequence:** A tariff could be imposed at the point-of-sale

***Canadian Private Copying Collective v Canadian Storage Media Alliance***

* A permanent embedded or non-removable memory, incorporated into a digital audio recorder (e.g. MP3 player, iPod), doesn’t retain its identity as an ARM—it wasn’t open to the Board to establish a levy on such a memory under Part VIII

***Apple Canada v Canadian Private Copying Collective***

* The Board has no legal authority to certify a tariff on digital audio recorders (e.g. MP3, iPod) or on the memory permanently embedded in them

## BACKUP COPIES DEFENCE

s29.24 provides that it isn’t an infringement of c’right for a person who owns (or has a licence to use) a copy of the work to reproduce the source copy if certain requirements are satisfied:

1. The person does so **solely for backup purposes** in case the source copy is lost/damaged/otherwise rendered unusable;
2. The source copy isn’t an infringing copy itself;
3. In making the copy, the person didn’t circumvent a technological protection measured (as defined in s41); **and**
4. The person doesn’t give any of the reproductions away

This defence broadly applies to *works*, whereas the private copying regime just applies to music.

# ENFORCEMENT of RIGHTS

**Primary infringement provision:** s27(1) *It is an infringement of c’right for any person to do, without the consent of the owner of the c’right, anything that by this Act only the owner has the right to do*

There are a number of ways by which c’right owners protect against infringement:

* **Courts** (action for c’right infringement)
	+ *Conflicting application for c’right registration?* 🡪 Go to FC (*FCA* s20)
	+ *Dispute that turns on CL principles? Looking for criminal remedies?* 🡪 Go to provincial court
	+ *Remedies?* 🡪 The FC has concurrent Jx where a remedy is sought respecting c’right (*CA* s41.24)
* **Contracts:** By way of contract, individuals can bargain away users’ rights or make restrictions stricter than the *CA* provides
* **Technological protection measures:** Technologies that control and/or restrict access to digital media content electronic devices
	+ **TPM** [41] = any effective technology/device/component that controls access to a work or restricts the doing of an infringing act
	+ **Examples:** Limits on the # of simultaneous users; encryption/scrambling; IP blocking based on location; selective incompatibility; print-blocking; watermarks; read-only books; labelling
	+ **Can’t circumvent TPMs:** s41.1(1) states that no person shall circumvent a TPM, offer services for the purpose of circumventing a TPM, or manufacture/sell/etc. any technology that is designed to circumvent a TPM
	+ **Remedies** [41.1(2)]**:** The owner of the c’right in a work in respect of which s41.1(1)(a) has been contravened is entitled to all remedies for c’right infringement against the person who contravened s41.1(1)(a) (by way of inJx, damages, accounts, delivery, etc.)
	+ **Private purposes exception** [41.1(3)]**:** The c’right owner can’t elect to recover statutory damages under s38.1 from an individual who contravened s41.1(1)(a) for his own private purposes
	+ **Other exceptions:** Law enforcement, encryption research, etc. (*note: fair dealing is not an exception*)
* **Other technological measures** 🡪 E.g. YouTube’s Content ID System
* **Notification letters** 🡪 Notice and notice system (*CA* ss41.25–41.27)

**CRIMINAL ENFORCEMENT:** *CA* ss42, 43 set out criminal sanctions for c’right infringement

* **E.g.** 42(1) Every person commits an offence who knowingly

(a) makes for sale or rental an infringing copy of a work in which c’right subsists

(b) sells or rents out an infringing copy of a work in which c’right subsists

(c) distributes infringing copies of a work in which c’right subsists

* **Summary conviction** 🡪 $25K fine; 6-month imprisonment, or both
* **Indictment** 🡪 $1M fine; 5-year imprisonment

# REMEDIES

s34(1) is the primary remedies provision of the *CA*. Where c’right is infringed, it entitles the owner to all remedies by way of inJx, damages, accounts, delivery up, and otherwise that are or may be conferred by law for the infringement of a right.

**STATUTORY DAMAGES** 🡪 s38.1(a) allows a c’right owner to elect to recover, instead of damages and profits in s35(1), an award of statutory damages for which any one infringer is liable individually, or for which any ≥2 infringers are liable jointly and severally

1. if infringement(s) for commercial purpose = sum between $500–$20K
2. if infringement(s) for non-commercial purpose = sum between $100–$5K

**PUNITIVE & EXEMPLARY DAMAGES** (*Cinar*)

* *Québec Charter* s49 provided for punitive damages for “an unlawful and intentional interference with any of the rights and freedoms that the *Charter* recognizes” (in this case, rights to property, inviolability, and dignity)

**LIMITATION PERIOD for CIVIL REMEDIES 🡪** s43.1(1) A court may award a remedy for any act/omission contrary to this act only if the proceedings for the act/omission are commenced within **3yrs** after:

1. The time the act/omission occurred (if π knew or could reasonably have been expected to know about the act/omission when it occurred
2. The time when π first knew of the act/omission (if π didn’t know and couldn’t reasonably have been expected to know about the act/omission when it occurred)