COPYRIGHT

HANDBOOK

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NCRA-ANREC

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Dear Reader,

Welcome to the National Campus and Community Radio Association's (NCRA/ANREC) copyright handbook project! As the copyright handbook editor, I have had the opportunity and privilege to write this legal resource for the Association and its members. After countless hours of research, meetings, and interviews, all the information I have learned is bound together in this book for you to explore.

DISCLAIMER: Please note, that although this handbook has been reviewed by multiple professionals and edited by a lawyer, it is a reference and should not be relied upon as legal advice. The NCRA/ANREC is happy to assist with any questions you may have, but I am not, nor are the NCRA or any other affiliated parties, responsible for any actions you might take based on the information gathered in this book. For legal advice, please seek a lawyer.

Content in the format *NOTE: followed by italic writing* refers to common practice or industry norms. They are not laws, rules or requirements, but they may help in to better understand the current copyright situation that NCRA/ANREC members encounter. As such, we encourage readers to conduct their own additional research. For legal advice, please seek a lawyer.

If you are looking for specific information, each section has its own Table of Contents where you can click on the specific issues you'd like to read about.

Nonetheless, I hope this book serves you well and can act as a useful reference whether you're a rights owner, a user of copyright works, or both!

Cheers,

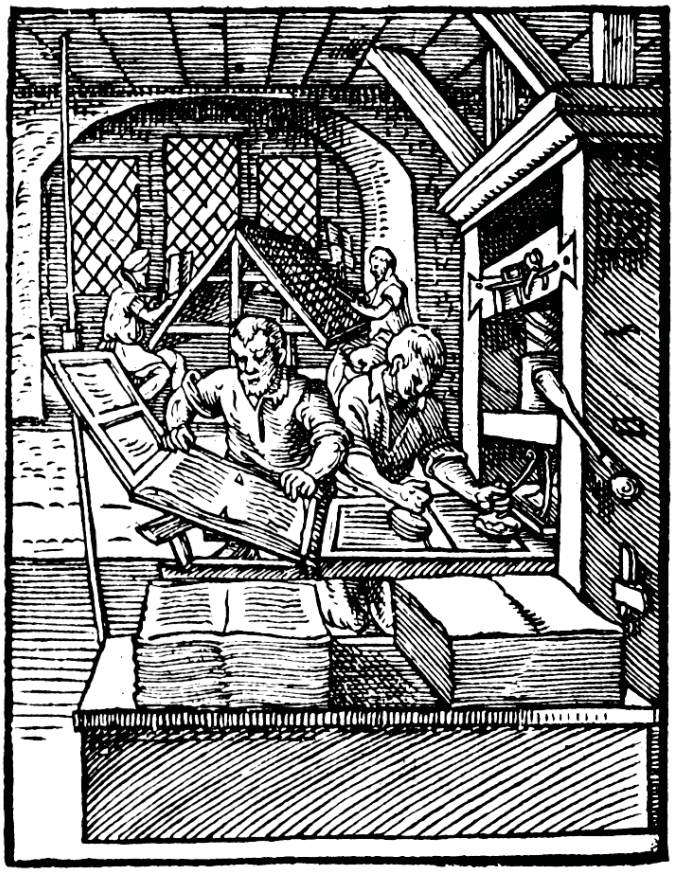
Bonnie O'Sullivan

Chapter One

The History of Copyright

In Canada, the struggle between the rights of authors and the rights of users to enjoy and build on copyrighted work has been part of an ongoing debate. In fact, this debate dates as far back as the early 1400s, with the innovation of the Gutenberg printing press.

In times when there was little to no mass reproduction, this struggle was not cause for much concern: there were a limited number of books available, and making new copies required someone (usually monks) to hand-letter new editions. But after Gutenberg invented the printing press, there was an explosion of literature suddenly made available for students, businessmen, and the upper and middle class. Even with such a drastic increase in the availability of creative works, it would still take a hundred years before the first copyright laws would be drafted.



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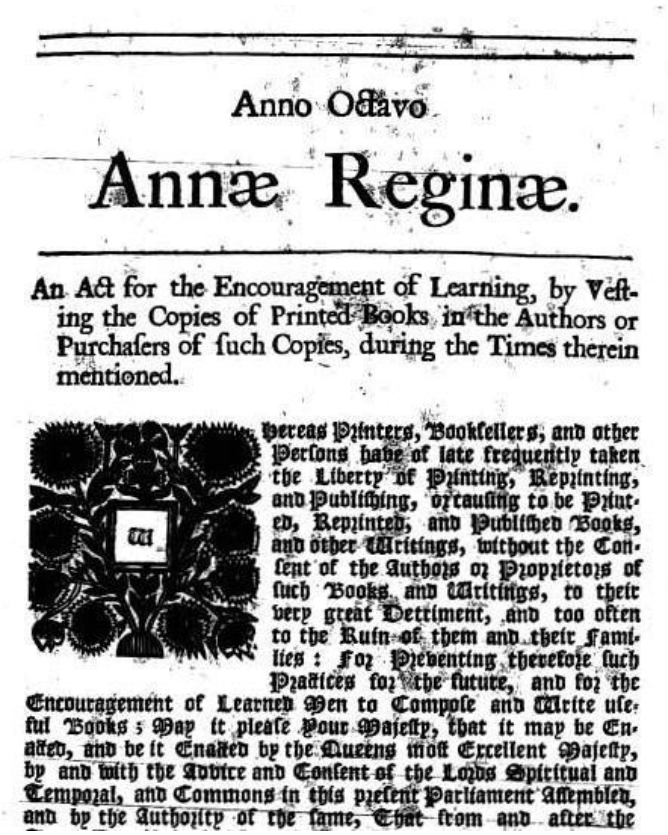
In 1557, the Royals granted a Royal Charter to the Worshipful Company of Stationers of London, granting it complete control over the printing business. From this point onward, the Stationers' Company and the government easily censored the publications allowed in the market.[1] Unfortunately, authors had limited rights, since it was up to the publishers (and the Crown) to decide what could and could not be published. Authors could sell their work once but would not benefit from, or have control over, the reprinting of their work.



Anno Octavo

Annæ Reginæ.

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.

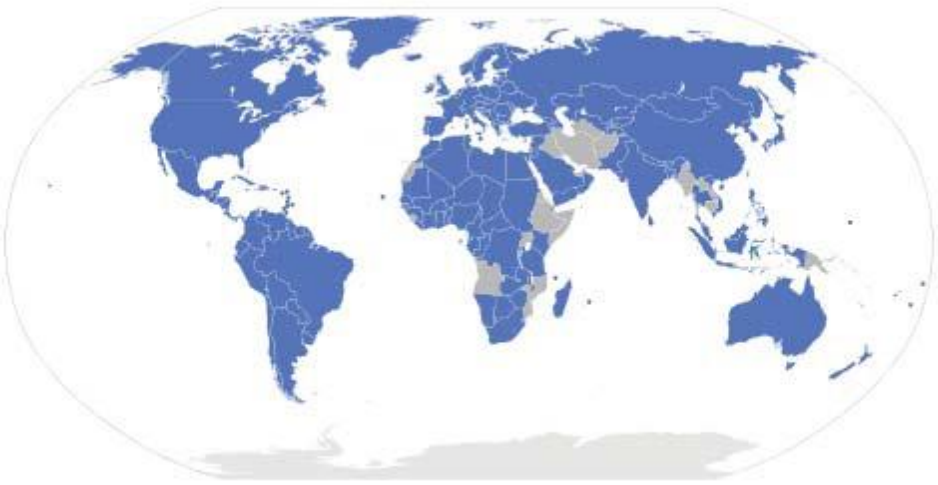
Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted, and be it Enacted by the Queens most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the

Photo: Wikimedia (licensed under the Creative Commons Attribution 3.0 Unported)

The *Statute of Anne* was enacted in England in 1710, effectively marking the end of publishing monopolies in Great Britain and beyond.[2] This law recognized that authors and copyright proprietors were not benefitting financially or being recognized for their work because booksellers, printers, and others could freely copy and sell them without paying any compensation or giving any recognition to the author. In addition to providing authors with legally enforceable protection over their works, this law also introduced a fixed term of protection for published works. Authors of books enjoyed a fourteen-year copyright term which could be renewed for another fourteen years if they were still alive. In essence, the *Statute of Anne* helped writers make a living from their works.

What is the *Berne Convention*?

Canada's first attempt to protect copyright at home came in 1886, as books became easier, faster, and cheaper to reproduce. Due to a growing fear of inventions being copied and commercially exploited, a number of countries formed a contract concerning copyright called the *Berne Convention* (*Berne*). Canada, as a colony of England, was represented by the United Kingdom as one of the original eight contracting parties. Today, 171 parties are signatories to *Berne*. Accordingly, they agree to respect the automatic copyright of creative works of all residents and citizens of the other contracting countries.[3] Thus, the copyright of all Canadians is respected by all signatories of *Berne*.



Map of countries that have ratified Berne Photo: Wikimedia (licensed under the Creative Commons Attribution 3.0 Unported)

"*Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.*" - Zechariah Chafee Jr.[4]

Canada's own *Copyright Act*

Although a signatory to *Berne*, Canada did not have its own copyright laws until 1921, when Parliament enacted the *Copyright Act of Canada* (the "*Act*"). The *UK Copyright Act*, which is largely recognized as the basis for the current Canadian *Act*, was passed in 1911, repealing most of the previous copyright legislation that had been in place. Inspired by these changes, Canada started developing an *Act* of its own, officially coming into effect on January 1, 1924[5].

Since then, the *Act* was, and continues to be, amended to adjust to the ever-changing technological, political, and social landscape. The most current amendments came in the form of the *Copyright Modernization Act* (*Modernization Act*) in 2012. Change was welcome, as the laws had not been adjusted since the 1990s. Furthermore, the Canadian government became aware of the need for copyright laws that would be relevant for the dot-com era. Some amendments to the *Act* included:

- implementing the rights and protections set out by the *World Trade Organization* Internet treaties;
- giving copyright owners the tools needed to combat piracy;
- clarifying the roles of ISPs and search engines; and,
- creating more opportunities to use material for teaching in the classroom.[6]

What is the *Universal Copyright Convention*?

The *Universal Copyright Convention* (*UCC*) was adopted in 1952[7] as an alternative to *Berne*. Some countries did not agree with aspects of *Berne* but still wanted to participate in some form of multi-national copyright protection. These original countries included the United States, the Soviet Union, most of Latin America, and some developing countries. Some of the countries felt that *Berne* overly benefited Western countries while the US and Latin America wanted to be a part of an agreement that was stronger than the Pan-American copyright conventions. Signatories to *Berne* also joined the *UCC* in order to ensure copyright protection in non-*Berne* countries.

There are three international rules for signatory states to follow under this convention:

1. signatory states must give the same rights to citizens of fellow signatory countries as they do to their own citizens and residents
2. the copyright owner has responsibility to include the © symbol, the owner's name, and the year of the publication in all copies of the work outside the country of creation
3. all signatory states must grant an exclusive right to translation for a seven-year period.[8]

David Fewer: CIPPIC. Photo by CIPPIC, used under Creative Commons Licence

David Fewer: Diverse conversations lead to balanced copyright laws

"As times have changed, so has copyright law", expressed David Fewer, the director of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC).

CIPPIC is Canada's only public interest technology law clinic, located at the University of Ottawa. The clinic intervenes and advocates on behalf of public interest in debates about technology and law. CIPPIC also offers an interesting clinical education in technology and law to the students of the University of Ottawa.

As director of CIPPIC, Fewer ensures that the organization runs smoothly. He also participates in selecting which policy debates the clinic will partake in, although most of the debates tend to choose CIPPIC, he said.

Since joining the clinic in the mid-2000s, Fewer has witnessed dramatic changes to copyright law and how it is approached by politicians, creators, and the public.

"The first bills that we saw to amend copyright in this millennium were all, by and large, about granting more rights, longer rights, and stronger rights to copyright owners often at the expense of users of copyright materials, but also at the expense of authors, and certainly at the expense of downstream creators…" explained Fewer.

This way of approaching copyright is no longer the case. It's more about balance for everyone, he said. Fewer listed three reasons for this change:

1. Copyright affects more people in less intermediated and more obvious ways than it used to. "When we wanted to access music back when I was a kid, we had to go through some intermediary, we couldn't get it straight from the artist or in methods of the artist's choosing. Instead, we had to go through a music label and through a music store," said Fewer.
2. People can access information about copyright more easily today than they could before the Internet. Websites specializing in copyright and technology law are now easily accessible, explained Fewer.

3. Policy makers are hearing a more varied collection of voices than ever before on the issue of copyright. “Copyright policy affects all Canadians and so all Canadians affected are letting politicians know their views…” said Fewer. Users, creators, and creator groups are now being included in the mix of voices heard by the government.

But, to keep copyright balanced there needs to be continued participation in copyright conversations among diverse groups.

“Everybody with an interest in copyright, broadcasting, or podcasting that wants to see a change in copyright law needs to understand that all politics are local”, said Fewer. “Stakeholders, politicians and decision makers need to be contacted in order to be aware that there is a concern”, he explained.

Advocates—whether broadcasters or public interest advocate organizations like CIPPIC—should publicize their concerns to their community too, said Fewer. This way, their community can share and help advocate for those concerns.

“There is nothing like the sound of a bunch of advocates talking to one another and not talking to the decision makers, to ensure that nothing gets done, at least nothing that will help you,” concluded Fewer. “So go out there and talk.”

Chapter Two

Traditional Copyright

What is copyright?

The term "**copyright**" refers to the exclusive rights conferred by the *Act* on copyright **authors** and owners. "Author" is the specific language the Canadian *Copyright Act* (the "*Act*") uses to refer to the creator of a traditional work. In this handbook, any time you see the word **author**, you ought to infer that it is the person who created it, and not necessarily an author of literature. An author can be a composer, a choreographer, a filmmaker, a sculptor, a songwriter, a copywriter, or any other person that made something which copyright protects. Works can be authored by more than one individual.[9]

Note as well, that the *Act* grants ownership to the first author of a work,[10] but quite often the first author is not the owner. This is especially true in cases where the author is an employee, a freelancer, or where ownership is transferred in the course of a business arrangement.[11] These rights are traditionally assigned to "**works**" like musical scores and lyrics, paintings, sculptures, books, poems, articles, films, and scripts.

Performers, makers of sound recordings, and broadcasters are not traditional authors in the way just described, but can still be granted rights for works they create. These are called "**neighbouring rights**". They don't operate identically to traditional copyright, but can protect things like performances, sound recordings and communication signals.[12]

Perhaps the most important right granted to owners of copyright is the **sole right to produce or reproduce the work in any material form**.[13] This is often referred to as an economic right, and in essence, permits owners of copyright to dictate how their work is to be disseminated and shared. This right can be waived or transferred to another party.[14]

Also recognized in Canada—although to a lesser degree—is the **moral right** of authors of copyrighted works.[15] This refers to a copyright owner's right to the integrity of the work, a right to have the work attributed to the author, and the right to remain anonymous. Unlike economic rights in copyright, **moral rights** to a work cannot be assigned but may be waived in whole or in part.[16]

A violation of these, and other rules and rights outlined in the *Act*, can result in an infringement.

Most governments recognize the rights of owners of copyright. However, countries do not always share the same rules and regulations; for example, countries may differ on the duration of copyright protection. In Canada, copyright currently subsists for 50 years following the author's death.[17]

Infringement of Copyright

According to Innovation, Science and Economic Development Canada [18]:

> There are consequences for breaking any law. Breaking or infringing the copyright law is no different. The consequences of infringing the copyright law can be civil or criminal, and are set out in the copyright legislation.
>
> For example, a civil court may decide that money be paid as compensation for damages caused by unauthorized use of a copyright work. This civil remedy is the most common and frequently-sought type

of remedy.

Another type of civil remedy is an injunction to prevent or stop infringing activities. A court has the authority to order the infringing party to account for the profit made from infringing activities and to order that all infringing copies become the property of the copyright owner.

A unique feature of the civil remedy system in the Copyright Act is a statutory limit on the amount of damages that a court can award to a copyright owner who has not authorized a collective society to license the photocopying of his or her work. Damages are limited to the amount the copyright owner would have received from a collective, either under an agreement or under a tariff set by the Copyright Board of Canada.

Infringement of the Copyright Act can also have criminal consequences. These remedies in the Copyright Act involve fines and possible imprisonment. The Act provides for a maximum fine of $1,000,000 where the offence is a serious one. The criminal sections in the Copyright Act are traditionally used to deal with commercial piracy. Examples most frequently encountered are copying videotapes/DVD in order to rent or sell them, and selling or dealing in illegal copies of video games, compact discs, computer programs, or music.

What is protected by copyright?

Copyright applies to all original **literary**, **artistic**, **dramatic** and **musical** works:

- Literary works can include books, computer programs poetry, stories, memoirs, and other works consisting of text;
- Artistic works can include photographs, paintings, drawings, sculptures, and compositions;
- Dramatic works such as plays, operas, motion picture films, and screenplays; and,
- Musical works such as compositions; these need not contain words.

Copyright also applies to the subject matter protected as neighbouring rights:

- **Performers' performances**, which include performances of an artistic, dramatic or musical work; a recitation or reading of a literary work; and an improvisation of a dramatic, musical or literary work;
- **Sound recordings**, whether or not they are a performance of a work. This excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work; and,
- **Communication signals**, meaning radio waves transmitted through space, for reception by the public.

What is *not* protected by copyright?

- Ideas, schemes or methods
- Facts/information[19]
- Inventiveness/novelty[20]
- Processes

What makes a work copyrightable?

In Canada, an author enjoys automatic copyright to their work, provided it meets a set of standards prescribed by the *Act*. Copyright subsists in all original, literary, dramatic, musical and artistic work if one of the following conditions is met:

- the author was, at the time of the making of the work, a citizen/subject of/ordinarily resident in a treaty country (see Nationality on p. 15);
- in the case of a cinematographic work, whether published or unpublished, the maker is a corporation with headquarters in a treaty country or, if a natural person, was a citizen/subject of/ordinarily resident in a treaty country; or,
- in the case of a published work, the first publication occurred in a treaty country.[21]

Originality

In order to be subject to copyright protection, the work must be original. This connotes an original expression of thought on behalf of the author. Thus, the work must originate from the author and must not be copied from another resource.[22]

Furthermore, the work must not be in the **public domain**.[23] In order for his/her work to be considered original, an artist must use a significant amount of skill in producing the work, and must also use judgment (the ability to compare different possible options in producing the work).[24]

The work must be more than just a mechanical exercise. For instance, if someone were to list all the short stories ever written by Canadians and collected them in an anthology, they would likely not enjoy copyright because this does not require the exercise of skill and judgment. However, if they made an anthology of "the best" short stories written by Canadians, then they've used skill and judgment in deciding what to include and what not to include. The purpose of this requirement is to encourage creativity and to provide reasonable access to the fruits of creative endeavours.

Fixation

The work must be in a physical and permanent form. The reason is that there must be evidence that the work exists for it to be protectable: if someone asked for proof that you created a work, how would you prove it? By showing them the work.

For example, imagine you made a song up on the spot in front of your friends. After the performance, there would be no proof defining what had just occurred. However, someone could write it down, record it, capture it in a video, or save its expression on their computer, and any of those would constitute sufficient fixation for the work to be protected. Additionally, some of those (like the sound recording) might themselves be given a separate neighbouring rights protection, over that exact recording of the work.

Nationality

At the date of creating the work, the author must be:

- a Canadian citizen; or
- a Canadian resident; or
- a citizen or subject of a *Berne Convention* country;[25] or
- a citizen, subject, or resident of a *Universal Copyright Convention* country;[26] or
- a citizen, subject, or resident of a *World Trade Organization* member;[27] or
- a citizen, subject, or resident of any other country of which the Minister may have extended copyright protection that is not part of any of the above treaties. The Minister will publish who these other countries are in the Canada Gazette.[28]

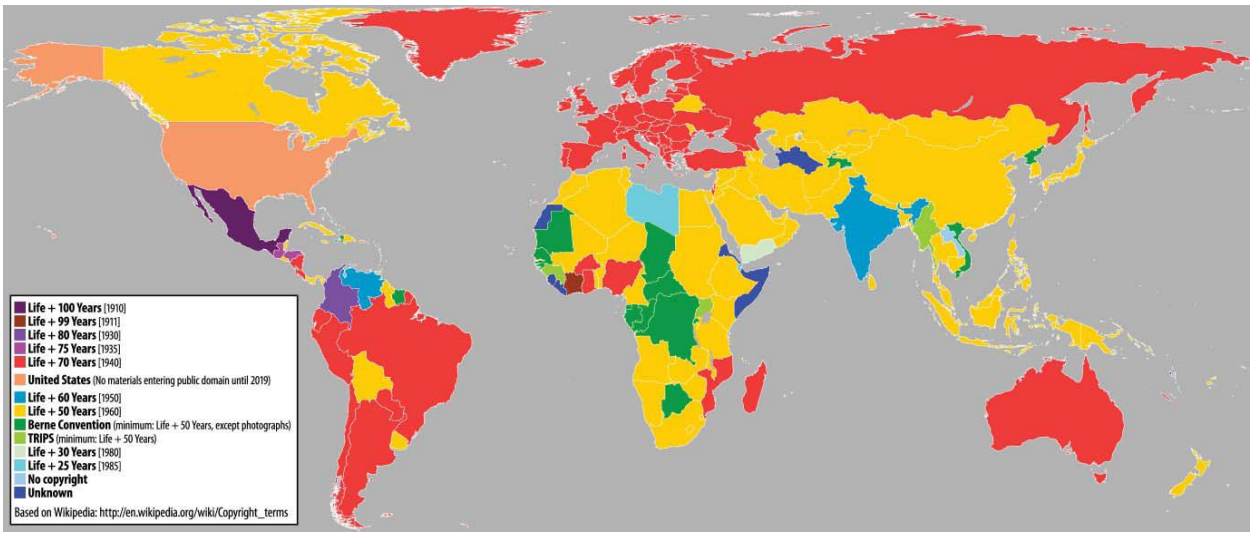


Photo: Wikimedia (licensed under the Creative Commons Attribution 3.0 Unported)

What is a copyright owner?

Even though the first authors actually wrote, drew, composed, or produced the work in question, the *Act* confers its section 3 rights on the owners of those works.[29] Generally, since copyright is automatically triggered on creation, the traditional copyright owner *is* the first owner.[30] There are a few exceptions to this rule: work created by an employee typically belongs to the employer.[31] Work created by a government employee belongs to the Crown.[32] Work created by a freelancer might belong to the client.[33] And, authors who are the first owners of copyright can transfer or assign some or all of their economic rights to someone else.[34] So, for a variety of reasons, the owner may be a person or entity different than the original author.

The owner of a work enjoys an economic right (the right to reproduce the work), and the right to the work's performance and communication (where applicable). The owners of copyright are entitled to act upon their rights and to exclude others from doing things that would violate their rights.

Moral rights on the other hand cannot be assigned, so the owner of these rights will always be the first author(s).[35] However, they may be waived in whole or in part.[36]

How long does copyright last?

In Canada, copyright over traditional works generally lasts for 50 years after the year in which the author has died.[37] After those 50 years are up, the creative work is free from restrictions imposed by copyright law and becomes part of the "public domain". If there are multiple authors holding joint authorship in the work (such as a band that collaborated in writing a song) copyright subsists during the life of the author who dies last, for the remainder of the calendar year of that author's death, and for 50 years following the end of that calendar year.[38] Likewise, if the owner of a copyright is a corporation, the copyright term of the work will still be 50 years from the date of death of the author if he or she is known.

In the case of a sound recording in which the performance is fixed and published before the copyright expires, the copyright continues until 70 years after the year in which the publication occurred or the end of 100 years after the end of the year in which the first fixation of the performance in a sound recording occurred, whichever is the shortest of the two.[39]

In spite of various copyright treaties to which Canada is signatory, Canadians must nonetheless respect copyright terms in accordance with Canadian law. So, if a work was created in the Republic of Seychelles where copyright is respected for 25 years beyond the death of the author, Canadians would still have to adhere to the 50 year rule outlined in the *Act*. Similarly, authors who are nationals of any country other than a country that is a party to the *North American Free Trade Agreement* (i.e. Mexico, US, Canada), that grant terms of protection shorter than what is stipulated in Canadian law, are not entitled to claim a longer term of protection in Canada.[40]

Things can be a little foggier online. A book that is a part of the public domain in Canada might still be under copyright elsewhere such as the US where the term extends 70 years after death. Works that are legally in the public domain in Canada might be exposed to audiences from different jurisdictions where the uploader may be liable for copyright infringement. One way some Canadians minimize this risk of infringing copyright terms of other jurisdictions is by using geo-blocking software to block those jurisdictions from accessing the potentially infringing content of their website.

Looking at the annual Forbes list of top dead earners, one realizes just how much money is earned from copyrighted material even when the author has died. But where do their earnings go? The money usually goes to the author's estate. No matter who the owner is, any assignment or grant of an exclusive licence ends automatically 25 years after the death of the author.[41]

NOTE: the length of copyright after the death of the author is under review by government and may be changed. This guide will be updated to reflect any changes that occur so you may wish to visit the PDF version posted on the NCRA/ANREC website periodically to check for updates.

Michael Geist: University of Ottawa. Photo used under Creative Commons Licence

Dr. Michael Geist talks Copyright, the Internet, and the Future

The Canadian government has spent a good part of the last decade developing copyright regulations to balance rights of users and copyright owners during the digital age. In 2012, the government released a new set of rules in the form of the *Copyright Modernization Act*, which aimed to balance the rights of copyright owners and the rights of users of works in Canada's ever-changing technological landscape. The Internet is one such technology that has made access to a vast amount of content (including many copyrighted works) easily available to the average Canadian who has an Internet connection.

Dr. Michael Geist, a law professor at the University of Ottawa, is one of the most prominent Canadian experts to discuss this relationship between the Internet and copyright. Geist holds the Canada Research Chair in Internet and e-commerce law. He also regularly writes columns in the Ottawa Citizen and Toronto Star.

Geist said his interest in copyright was sparked from the intertwining connection between new technologies and copyright. Near the turn of the century, Geist noticed that some of the rules being proposed to deal with the Internet's impact on copyright were worrisome.

"Some of the rules being proposed…were highly restrictive, and I think ultimately dangerous and damaging to consumers, to students, and to many creators," explained Geist. He has become an influential figure in copyright debates and discussions centring on Canada's effort to balance rights of users and owners.

"At the turn of the century, it was clear that copyright laws needed some adjustment to ensure they made sense in the Internet age," said Geist. "And just as the laws needed a revamp to stay relevant, long gone are the days when creators can stay offline and still achieve success."

"…there might be some amount of infringement that takes place [on the Internet], but the benefits that accrue from finding audiences, of getting the dissemination and distribution of their work, offer up opportunities for other kinds of commercialization and monetization."

“We’ve seen a lot of success from groups and artists that have really embraced this and recognize that yes, there might be some amount of infringement that takes place, but the benefits that accrue from finding audiences, of getting the dissemination and distribution of their work, offer up opportunities for other kinds of commercialization and monetization.”

With all the changes in copyright law over the last decade, there is one thing that has not yet changed. Canada’s traditional copyright term has continued to be 50 years from the last day of the calendar year in which the creator has died.

Geist said he wonders if the traditional copyright term might increase due to external pressures, to a term of 70 years like in the United States. Japan is currently in talks of raising their copyright term, he noted.

However, Geist does not think much will change in Canada’s copyright law in the near future. “The government will likely focus on issues other than copyright for a while since so much attention has already been spent,” said Geist.

So for now, both owners and users of copyrighted work can enjoy the new and more technologically relevant regulations developed over the last decade, knowing the rules may remain the same.

Three different types of rights protected by copyright

Copyright in traditional works (literary, dramatic, artistic, and musical works) is actually a bundle of different rights. There are ten specific rights listed in section 3(1)(a)-(j) of the *Act*, with the three main categories being reproduction, performance, and communication (also called "publication") rights.[42]

What are reproduction rights?

The owner of a work's copyright has the "exclusive" **reproduction rights** to copy or reproduce a copyrighted work. This means they have the right to prohibit someone from copying or reproducing the work as opposed to just having the right to be compensated for the work. Unauthorized reproduction is an **infringement** of the owner's copyright.[43]

Because the *Act* confers on the copyright owner "the sole right to produce or reproduce the work *or any substantial part thereof*",[44] an infringement occurs where a substantial part of the earlier work is taken. Replicating an entire copyrighted work is an infringement. However, the definition of "substantial" is ambiguous. Thus, it is difficult to say with certainty whether a specific use falls under this category. Is taking five or ten or fifty percent of a book substantial? What if the order of the words is changed? What a "substantial part" really means is fact-specific and could be defined either qualitatively or quantitatively.

Canadian courts have advised that some of the factors to take into consideration in this analysis include: the quality and quantity of the material taken,[45] including the importance of the parts taken from the copyright owner's work and how original those parts are;[46] the extent to which the purported infringer's use adversely affects the owner's activities and diminishes the value of his/her copyright;[47] whether the material taken is the property subject-matter of a copyright;[48] whether the purported infringer intentionally appropriated the copyrighted work to save time and effort;[49] and whether the material taken is used in the same or in a similar fashion to that of the copyright owner.[50]

Not only is there ambiguity concerning what a substantial part of a reproduction might be, but the definition of "reproduction" itself is a very topical matter of controversy. The Supreme Court of Canada has ruled that a download of a song available on the Internet is considered a reproduction of the song. On the other hand, a stream of a song is considered a communication to the public and not a reproduction.[51] In the most recent Supreme Court copyright case, the Court debated whether "ephemeral" copies—made only for the purpose of facilitating the broadcast—counted as reproductions. The Court decided that they did.[52]

What is communication by telecommunication?

Communication rights include the rights to communicate a work to the public through telecommunications (such as, but not limited to, broadcast, cablecast, and webcast).[53] Authors have "exclusive" communication rights to prohibit someone from or allow someone to communicate their work through means such as the radio.

Since it can be difficult to keep track of every instance in which an author's work was communicated, copyright collectives often keep track and collect compensation on behalf of the author.

In *Rogers v SOCAN,* the Supreme Court of Canada was to determine whether streaming on-demand constituted communications to the public.[54] The court held that a stream of a song on the Internet is an exercise of communication rights. The author must authorize a stream of a song (directly or indirectly),

and all rights holders are to be remunerated for the communication, typically through the form of royalties. On the other hand, a download of a song exercises the reproduction rights in which authors, performers, and sound recording artists have exclusive rights to authorize the use.

What is the public performance right?

The public performance right is the sole right to perform the work or any substantial part of the work in public either as a live performance or a performance of a recording. Authors have "exclusive" rights to say whether or not the work can be performed for certain groups of people.[55] This does not prevent the performer from entering into a contract governing the use of the performance for the purpose of broadcasting, fixation or retransmission.[56]

Krystal Caring & Sebastien Plante at Carleton University for the Velvet Studio Radio Show Photo by: Luke Smith

What are moral rights?

Moral rights are a separate non-economic right which recognizes a work as an extension of the author, as the embodiment of her will or personality, which deserves protection. As non-economic rights, they are not concerned with the right to compensation for the work, but rather with protecting the honour and reputation of the author from prejudice. Sections 14.1 and 14.2 of the *Act* describe moral rights.

Remember that there may be more than one author if, for example, a band writes a song together. Thus, there may be more than one moral rights owner.

Moral rights include:

1. The right to attribution
   - The author has the right to have their name attached to the work.
2. The right to the integrity of the work.
   - If the work is distorted, mutilated, altered, or used in relation to a product, service, cause, or organization that does not represent the moral rights holder's views and would therefore harm his or her reputation and honour, this constitutes a breach of their moral rights.

An example of a potential moral rights infringement would be a controversial documentary film asserting the superiority of one cultural group over another, which used a Canadian band's song in its soundtrack. Presuming the band did not agree with the position taken in the film, they could claim that the integrity of their work was damaged because of the song's association with it.

Of course, if the moral rights holders had given written permission for the director to use their song, knowing what the film was about, then they would not be able to change their mind and penalize the director for using the song.

Moral rights only apply to individuals and cannot be transferred or assigned to companies or others but they can be waived. This is often the case when authors sign contracts with publishers to exploit their work. Thus, it is always best practice to read contracts carefully before signing.

If the moral rights were not waived and the author has passed away, the moral rights will pass down to the heirs of the author. Moral rights will last 50 years from the last day of the calendar year in which the author died, as moral rights in respect of a work subsist for the same term as the copyright of the work.[57]

Moral rights can be compared to defamation law; that is, harming someone's reputation by explicitly saying they did or are something that is untrue. Both moral rights and defamation have to do with unjustly harming someone's good character in the eyes of the community.

Chapter Three

Neighbouring Rights

What Are Neighbouring Rights?

Neighbouring rights border traditional rights. They refer to works that lack traditional "authors" and cover only the medium or signal itself, not the work it carries or contains.[58] They are rights which enable performers, makers of sound recordings, and broadcasters to receive royalties for the public performance or communication of their works.[59] Neighbouring rights for sound recordings have been around since 1924. Performer's performance and communication signal rights were added in the 1997 Amendments.[60]

In the case of mainstream labels, the label often owns the rights of performers and sound recording makers because that label employs the performer and sound recorder. However, this tends not to be the case for independent artists where the author, performer and recorder are usually the same person or group of people.

How long do neighbouring rights last?

Unlike the 50 year copyright term for traditional works, the term for Canadian performers and sound recording makers is 50 years from when the work was first fixed. However, if published, the earlier of 70 years from the date of publication and 100 years from the date of fixation applies.[61]

The communication signal right lasts for 50 years from the last day of the calendar year in which the signal was broadcasted. This is different than the term for traditional rights holding authors who will enjoy copyright protection from the moment the work is created until 50 years after the year they pass away.

Haley Remple &Ian Hodges pose for a picture at CKUW, the University of Winnipeg. Photo by: Robert Schmidt

What is the performer's performance?

A performer's performance refers to a performance of any artistic work, dramatic work, or musical work; a recitation or reading of a literary work; and an improvisation of a dramatic work, musical work or literary work.[62]

As outlined in section 15 of the *Act*, a performer's copyright in the **performer's performance** includes the following rights:

- f it is not already fixed, the right to communicate it to the public by telecommunication (including radio), perform it in public, and to fix it in any material form;
- if it is fixed, the right to reproduce any fixation that someone else made without the performer's authorization;
- where the performer authorized a fixation, the right to reproduce any reproduction of that fixation, if the reproduction was made for a purpose other than that for which the performer's authorization was given;
- where the performer authorized a fixation, the right to reproduce any reproduction of that fixation, if the reproduction was made for a purpose other than one permitted under Part III or VII of *the* Act; and
- the right to rent out a sound recording of it.[63]

Unlike the fact that there can only ever be one author or a single group of authors who own a single work, there can be multiple separate performers that all enjoy rights to their individual and distinct performance, in one work. For example, in theory Celine Dion owns performance rights to *her* version of Silent Night while Michael Bublé owns performance rights to *his* version of the same *Silent Night* (by the way, *Silent Night* is a public domain work, but the same concept applies to works still under copyright protection.)

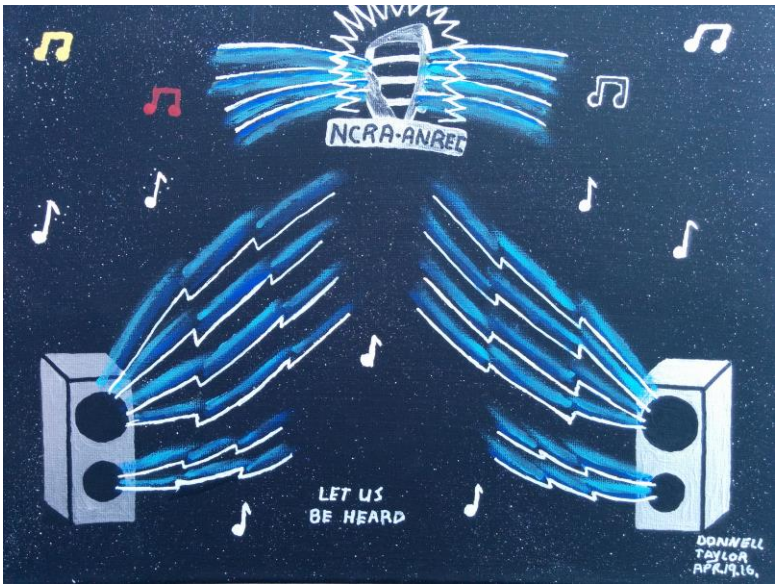


Photo of artwork commissioned for NCRA office by Ottawa Artist Donnell Taylor. Photo By: Barry Rooke

What is a sound recording maker?

According to the *Act,* the **sound recording maker** is the individual/group of individuals who undertook the arrangements to make the recording. This includes: "entering into contracts with performers, financial arrangements and technical arrangements required" for the recording.[64] Typically, this is not a creative act. Rather, it includes a recording company involved in the commercial activity of settling the record's final version.[65] Accordingly, the sound recording maker is more often than not a record label.

Sound recording makers are subject to rights outlined in section 18 of the *Act*. These include a copyright in the sound recording, which consists of a sole right to publish the recording for the first time, to reproduce the recording in any material form, and to rent out the sound recording. It is up to the sound recording maker to authorize such use.[66]

What is a communication signal?

Broadcasters, whether radio or TV stations, have a special set of rights that apply solely to them. Basically, broadcasters have the right to fix (that is, permanently record) their own broadcast signal, the right to allow another broadcaster to simultaneously rebroadcast that same signal, and in the case of television communication signals, to perform them in a place open to the public on payment of an entrance fee.[67] The *Act* defines a **communication signal** "as radio waves transmitted through space without any artificial guide, for reception by the public."

For more information on the duties and rights of campus and community radio stations, see Chapter Six.

NCRA/ANREC members at NCRC 2015 AGM, Saint John, NB Photo by: Anthony Enman

Chapter Four

Users' Rights

How does copyright apply to users?

Copyright law is intended to protect creative works from being copied, used, or shared without the owner's consent. But, guaranteeing "all rights reserved" can sometimes be troublesome for the author and owner since it can limit their potential audience. So, the *Act* serves to strike a balance between the rights of users as well as the rights of owners of works.

This chapter will look at the rights users have in copyrighted works. The word "user" refers to everyone in one way or another because we all use copyrighted work in our everyday lives; from reading the news at breakfast, listening to the radio on our way to work, and watching a movie in the evening.

What happens after copyright expires? What is the public domain?

When copyright expires in a work, it is considered to be in the "public domain". Every Canadian is entitled to use public domain works freely, either by consuming it (watching a public domain movie) or creating new art incorporating the public domain work (drawing a moustache on the *Mona Lisa*).[68]

Traditional works in Canada generally fall into the public domain 50 years from the last day of the calendar year when the author died. For instance, Mary Rose-Anna Travers (La Bolduc) died on February 20, 1941, and her published music became part of the public domain 50 years later on December 31, 1991.[69] (See the WARNING on p. 25 for more on this.)

As previously mentioned, the rules are different for performers and sound recording makers.

Sometimes, people that hold copyright over their work want to make it freely available as if it were in the public domain. They may state that their work is in the public domain and they may make it available in public domain archives. Although they see their work as if it were in the public domain, it is important to know that only works whose copyright term has expired can be legitimately considered to be a part of the public domain. Technically, their work is still under a copyright term and they are simply choosing to grant everyone access to their work in the same fashion as if it were public domain. Some may choose to do this because it runs parallel to their moral and political beliefs, while others see it as a chance to get their work recognized by a larger audience.

Nonetheless, it is important for users to recognize when a work is truly in the public domain and when a work might appear to be so, but in reality, is not. Users need to be aware that sometimes authors' works might be present on a public domain website without their consent. Thus, it is always good practice to dig a little deeper and make sure that the author's true intentions are being reflected.

There are several resources that can be consulted to find content freely available in the public domain:

- International Music Score Library Project (Petrucci Music Library)
    - In 2006, a Canadian named Edward W. Guo created an online library of musical scores, most of which are in part of the public domain. Since June 6, 2010, the website also offers licensed recordings and recording from the public domain.

- Musopen
    - Musopen is a not-for-profit American website that provides recordings, sheet music, and textbooks to the public for free, without copyright restrictions.
- Choral Public Domain Library (ChoralWiki)
    - The Choral Public Domain Library, an American charitable website, was created in December 1998. It hosts choral/vocal scores, texts, translations, and other information.
- Project Gutenberg
    - Project Gutenberg is an effort to digitize and archive cultural works, to "encourage the creation and distribution of eBooks". Most of the items in its collection are the full texts of public domain books. The project tries to make these as free as possible, in long-lasting, open formats that can be used on almost any computer.
- Europeana
    - Europeana gives access to different types of public domain content from different types of heritage institutions. Examples include Da Vinci's *Mona Lisa*, *Vermeer's Girl with a Pearl Earring*, the works of Charles Darwin and Isaac Newton and the music of Wolfgang Amadeus Mozart.
- The Public Domain Review
    - The Public Domain Review is an online journal and not-for-profit project dedicated to the exploration of curious and compelling works from the history of art, literature, and ideas. The vast majority of the content exists in curated collections of images, books, audio, and film.

WARNING: it is best not to assume something is in the public domain just because it is listed as such. Different countries have different rules pertaining to the public domain. In the United States, the copyright term usually extends 70 years past the year of death. Thus, works that are in the public domain in Canada, may not be quite there yet in the U.S. The websites listed above come from all over the world. So, to ensure something is considered in the public domain here in Canada, further analysis is needed.

Likewise, not all content follows the 50 years after death term in Canada. For example, performers have a copyright term of 50 years from the date the work was fixed (recorded). There are many other exceptions that might extend or shorten the copyright terms of works. (See also the *NOTE* on p. 16 regarding the length of the copyright term.)

The Creative Commons

What is the Creative Commons?

The Creative Commons offers a series of licences (non-exclusive contracts) allowing copyright holders to grant others permission to use their copyright-protected works (such as music, writings, artwork, and many others). It makes available a variety of licenses that can cater to various circumstances. In essence, Creative Commons ("CC") licenses act as a signal to the world that you have preauthorized your creative content to be used in certain ways.

CC licences are curated by a non for profit organization founded in 2001 with aims to foster free access to research, education, and culture[70]. Because copyright forbids what technology allows, CC licences were introduced in 2002 to enable sharing and remixing in an era where increasingly strict copyright laws hindered the Internet's potential.

CC licences are a type of copy*left*, allowing authors to waive some of their copyright without having to personally give permission each time somebody wanted to use their creative work. In 1983, Richard Stallman first used the word "copyleft" to describe how he intended the GNU operating system to be used: by people working together so that all software users could have the freedom to personalize and adapt their computing. GNU describes their philosophy here.[71]

Authors can choose the particular CC licence that suits their inclination to share their work.

Source: www.graduatestudents.ca (licensed under the Creative Commons Attribution 3.0 Unported)

There are four optional elements to CC licences:

1) Attribution
The author must be credited for his/her work whenever it is shared or used;

2) Non-Commercial
The work cannot be used to profit anyone but the author;

3) No Derivatives
The work cannot be adjusted or remixed; and,

4) ShareAlike
When the work is used, the user must license their work or copy, in accordance with the licensing conditions of the original work;

What are the six types of CC licences?

Authors can choose a combination of "attribution" and other elements to create a licence that best meets their needs. There are six main combinations of CC licences:

1) Attribution (CC BY)
This licence lets others distribute, remix, tweak, and build upon the work, for commercial and non-commercial purposes, provided they credit the author. This is the most accommodating licence and is recommended for maximum dissemination and use.

2) Attribution-ShareAlike (CC BY-SA)
This licence lets others remix, tweak, and build upon the work both commercially and non-commercially, provided they credit the author and license their new creations under terms identical to those of the original work. This licence is often compared to "copyleft" free and open source software licenses. Wikipedia uses this license.

3) Attribution-NoDerivs (CC BY-ND)
This licence allows for redistribution, both commercial and non-commercial, as long as it is passed along unchanged and in whole, with appropriate credit to the author.

4) Attribution-NonCommercial (CC BY-NC)
This licence lets others remix, tweak, and build upon the work non-commercially. These new works must credit the author, but they don't have to be licensed on the same terms as are stipulated in the original work.

5) Attribution-NonCommercial-ShareAlike (CC BY-NC-SA)
This licence lets others remix, tweak, and build upon the work non-commercially, provided they credit the author and license their new creations under the identical terms.

6) Attribution-NonCommercial-NoDerivs (CC BY-NC-ND)
This licence is the most restrictive of the six main licences, only granting users permission to download and share works with others, provided they credit the author. They can't change the works in any way or use them commercially.[72]

When do CC licences apply?

CC licences apply when there is another copyright in place. In Canada—and many countries acting in accordance with the *Berne* Convention—registration isn't needed for copyright to come into effect, as creation *automatically* triggers copyright protection (for the types of work that copyright protects). In those cases, CC licences exist to allow for something that copyright automatically limits.

Conversely, CC licences can't impose restrictions on works lacking copyright to begin with, such as works in the public domain.

CC licences are **non-restrictive**, meaning that you can enter into other licensing agreements while maintaining the CC licence.

CC licences are **non-revocable**. So, if an author changes their mind and no longer wants their work to be licensed under a CC licence, anyone that already accessed, shared, or used the work according to the specific CC licence, hasn't infringed copyright. Additionally, copies, shares, or changes made by users while the work was under a CC licence can remain in circulation provided they already were so.[73]

Where do CC licences work?

CC licences apply internationally. Creative Commons started an internationalization program, and affiliate bases, like Creative Commons Canada, sprang up globally to create CC licences that catered to the law of that country. By 2007, the 3.0 generic licence was based on international copyright treaties. The current 4.0 licence was drafted to be internationally valid, consolidating all the licences around the world into a single licence.

The Canadian base produced its first licences in 2004. It is comprised of affiliate organizations, an advisory board that provides guidance and direction, and volunteers.[74] Check out Olivier Charbonneau's profile. He is a member of the Creative Commons Canada's Advisory Board, is working on his PhD in law, and is an associate librarian at Concordia University. Olivier also created a helpful video on Creative Commons. And in case you were wondering, the video is under a CC licence, granting us permission to pass the video to you (provided we credited the author!)

Olivier Charbonneau: University of Concordia. Photo from culturelibre.ca under Creative Commons Licence

Olivier Charbonneau: What's your end goal?

What is your goal as an artist or creator? Do you want your music to simply be shared among friends for fun? Or are you looking to make a career out of your musical talent? What path do you want to take to get to your end goal?

Olivier Charbonneau, a Creative Commons Canada Advisory Board Member and an Associate Librarian at Concordia University in Montreal, suggested that artists and creators should consider these questions when deciding what type of licence they should protect their works under.

Charbonneau, working on his PhD in law, is interested in copyright and questions about open access and social media. He said that his interest in copyright and his work as a librarian go hand-in-hand: "I see librarians as sort of doctors of copyright". It is Charbonneau's job to buy licences for the library in order to enable people to use copyrighted content. "I'm in there in the trenches trying to get copyright content to people and foster this market of cultural good."

Charbonneau's interest in open access and copyright sparked his involvement in Creative Commons Canada. The Creative Commons licences are one way creators can allow for greater dissemination of their work. "Copyright forbids what technology allows, and the only way to reverse that situation is to allow something that is either through contracts or licences or through exceptions in the *Copyright Act*."

Charbonneau suggested users of copyrighted work (e.g. cover artists) ask four questions before they circulate the material:

1. Ask if what you want to use is under copyright. If it is, see if you can obtain a licence from a copyright collective (e.g. SOCAN, Re:Sound, and CMRRA);
2. You should then see if your use falls into an exception in the *Copyright Act*. Does it fall under the category of fair dealing? In other words, is it being used for research, private study, news reporting, criticism and review, satire and parody, or education? (For more on this, see "What is the fair dealing exception?" below).

3. See if you can contact the rights holder(s) directly to request permission.
4. Ask if there is something else you can use instead. Is there something in the public domain under a CC licence. Tweak what you're doing so that it will adhere to one of the other options above.

Just as users should consider the work they want to utilize, authors should think about what type of licence they want their work under.

Charbonneau emphasized one particular benefit to artists who license their music under Creative Commons: the wider audience resulting from the open dissemination of their songs. When art travels openly and freely, it can reach more fans. This can help artists gain popularity.

"However, it is hard to get exclusive rights back if artists change their mind," said Charbonneau. This is because all the copies, shares, uses, and possible alterations that were made public when the work was under its CC licence, are allowed to remain in circulation. Removing a CC licence will only ensure that there can be no *new* uses from the artist's work.

So, if an artist wants to be signed by a mainstream record label that asks for all rights to the music, an artist might have to work a little harder to prove that the songs under the CC licences are just as valuable. "I don't know how much of a disadvantage it is for real, but it is something you have to think about," said Charbonneau. "Artists must keep in mind that contracts are negotiable", he added.

In the end, it is all up to the artist or user what path to success or fun they choose to take.

"Copyright is super important for sure," said Charbonneau. "But what's even more important is what your objectives are. What do you want to get out of the creation? ... Forget about all your options and ask yourself what is true to you. What do you want?"

DISCLAIMER: Although Charbonneau certainly knows a lot about copyright, he emphasized that he is not a lawyer and therefore, his comments, ideas, and suggestions are not legal advice that you would receive from a lawyer. Readers should talk to a lawyer regarding any personal legal issues.

If you'd like to hear more from Charbonneau, he has two awesome blogs, one French (culturelibre.ca) and one English (outfind.ca).

What is the fair dealing exception?

The *Act* outlines exceptions that apply to users of copyrighted material. The main such exception is the fair dealing **exception**, which dictates that fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.[75] This section of the *Act* was updated in 2012, by the *Modernization Act*.[76]

The addition of the **educational purpose** was meant to help educators and students take advantage of 21st century technologies like the Internet. For example, it is now legal for a music teacher to play a small portion of a copyrighted composition during a lesson.

What determines whether a use is a fair dealing? In the 2004 landmark case, *CCH Canadian Ltd v Law Society of Upper Canada (CCH),* the Supreme Court of Canada outlined six factors that can be considered in assessing the fairness of a dealing. Although these may not be applicable in all circumstances, they can provide guidance in a fairness analysis. These are:

1. **The purpose of the dealing**. Includes whether the work was intended for education, parody and satire, news reporting, private study, research, or criticism and review.
2. **The character of the dealing.** For example, if many copies of the work were disseminated, then it may not have been fair to the rights holders. But if one copy was used for a legitimate purpose, then it might be fair.
3. **The amount of the dealing.** It is permissible to use a "trivial" amount of a copyrighted work. However, the work cannot be "substantially" used unless it is successfully argued that a large amount of the work was needed to accomplish the purpose. For instance, someone might copy a large bit of text for the purpose of private study. In *CCH*, the Court said that copying a large amount of the text for the purpose of critique is unlikely to be acceptable.
4. **Alternatives to the dealing.** This factor questions whether there was an available alternative of a non-copyrighted work that could have been used to achieve the same outcome. Was the use really necessary for the work to be copied in order to achieve the user's purpose?
5. **The nature of the work**. This factor questions whether the reproduction acknowledged and led to wider dissemination of the original work. Although this may not always determine if the reproduction was fair, credit to the copyright holder and furthering the popularity of the work may be fairer than the work being confidentially reproduced in private.
6. **Effect of the dealing on the work:** This factor questions whether or not the reproduction interferes with the financial success of the original work. Although this might impact the fairness of the dealing, the *CCH* Court made it clear that this consideration is not the only or most important factor to consider.[77]

For more detail on the fair dealing exception, see "Can stations play clips from movies and TV shows".

Tim Chaisson and Jessica Mitchell a CKDJ event in Ottawa, ON. Photo by: Barry Rooke

The factors outlined in *CCH* were reaffirmed in *Alberta (Education) v. Canadian Copyright Licensing Agency* and in *SOCAN v. Bell Canada*. These 2012 cases said that first it must be determined that the dealing was for the purposes of research, private study, criticism or review, or news reporting. Next, the Supreme Court in both cases considered the six fairness factors outlined in *CCH*.

The term "fair use" is used in the US to define a similar yet different set of rules and exceptions. Although the "fair use" and "fair dealing" purposes may appear similar across jurisdictions, it is important not to conflate the two. The way in which these purposes are interpreted differs significantly, thus is important not to assume that just because something is considered a "fair use" in the US, it will also be considered a "fair dealing" in Canada.

What is the user-generated content exception?

This exception is also new to the *Act*, by way of the *Modernization Act*. This exception allows for non-commercial use of publicly available work, and applies to public performances, translations, adaptations, and communications to the public.[78] Examples of content it applies to include fan fiction, fan videos, and remixes.

In order for a use to be acceptable under this exception these three criteria must be met:

1. The original work must have been publicly available;
2. The use of the work must be for non-commercial purposes; and
3. The use cannot have a substantial and harmful effect on the commercial exploitation of the original work.[79]

What are the other exceptions?

There are several more exceptions described in sections 29-30 of the *Act*:

- **Reproduction for private purposes**. As long as the work has been legally obtained, Canadians can copy the work for their own personal uses. But if a Canadian copies a rented or borrowed work, they are not protected under this exception.[80]
- **Private music copying**. Canadians can reproduce music onto an audio medium (such as cassette or CD) for their own private use.
- **Reproduction of a broadcast for later listening**. If a Canadian recorded a radio program to privately listen to later (for example, to listen to at a more convenient time) then the Copyright Act says that this is okay. But it can't be from an on-demand service nor can the copy be kept for longer than is reasonably necessary.

- **Persons with perceptual disabilities**. If a Canadian (or someone acting on behalf of them) has a disability, they can reproduce works (translate, publicly perform, or adapt) into more perceptual formats without seeking rights owners' permission. However, this exception is not available when there is already a suitable alternative commercially available, nor is it applicable to films or in the making of large print books.[81]

Source: CC0 Public Domain via pixabay.com

What if a user gets permission to use the work in a way contrary to the licence it's under?

Technically speaking, if an author owns all necessary rights and permits someone to use the work in a particular way, she should be allowed to give written permission to use the work.

However, authors don't always have full control over all the rights like this. Neither do musical artists. By contacting this "artist", the user is contacting the performer of the song, but what about the author of that song and its sound recording maker? Both their permissions are needed if they are not the same person as the artist. Also, as mentioned earlier, the author might have transferred their copyrights to a publisher, while the performer and sound recording maker had transferred their rights to a label. If this was the case, then none of these people would have the power to grant permission because the publisher (usually owned by the label) and the label would have sole rights to grant permission. Thus, asking an artist's permission may not work in many instances and it might be safer to purchase a license from the relevant copyright collectives.

Source: CC0 Public Domain via pixabay.com

Also remember that just because one person may receive permission to use an author's work, this doesn't mean that everyone else has the permission to do so as well.

Laura Murray: Queens University, Kingston. Photo used under Creative Commons Licence

Laura Murray: copyright law shouldn't be a battlefield

Copyright in Canada is an ever-evolving and never-quite-satisfying legal matter for some, including Laura J. Murray, a professor in the Department of English at Queen's University in Kingston. Murray is a published author, having written about intellectual property and copyright law, including one of the NCRA's go-to references, Canadian Copyright: A Citizen's Guide, co-authored by Samuel E. Trosow.

"[Copyright is] always going to be imperfect because there's always going to be this balance between the people who are making things and the people who are using stuff," said Murray. And what belongs to whom and for how long are questions that do not have universally agreed upon answers.

Take, for example, the traditional stories of some indigenous groups, suggested Murray. Some indigenous groups view the storyteller not as the owner of cultural stories but rather the teller of community-owned narratives. This view is not represented in the individualistic views copyright laws strive to accommodate.

While strict copyright laws might protect the original creator, the ability for future creators to develop their skills is also impacted, said Murray. "They have to get there by being users themselves, by growing up reading books or watching movies." Murray described the relationship between creators and users as cyclical, in that all creators were users at one point or another.

Furthermore, works available on the Internet and other technological platforms have led to legislation that restricts users' rights more than ever before, said Murray. "If you're allowed to quote from a book into another book, you should also be allowed to quote from a video in another video," she explained. A book can be given or lent to a friend whereas a computer program downloaded online might not necessarily be transferable due to the licence it is under, added Murray.

But copyright law is not meant to be a battle between users and creators, said Murray. This is why she was impressed with the Supreme Court of Canada's decision in *CCH* that reflected a more common sense approach. She referred to the Court's statement that a particular practice or trade might need to be considered in determining whether a use of copyrighted work was fair.[82]

Murray suggested users of copyrighted content use this common sense mindset when they are unclear if their use is permissible. When in doubt, users should reflect on whether they think the use is fair and if they would appreciate people using their work in the same way.

Murray said she believes that anyone can make sense of copyright law if they try. “I’m not a lawyer. I stand as an example of someone who makes sense of it. …The thing is, [people] can understand the law if they need to.”

Chapter Five

Copyright Board, Copyright Collectives, and Tariffs

What is the Copyright Board of Canada?

The Copyright Board of Canada (the "Board") is an economic regulatory body established to determine, either by mandate or by request of an interested party, the royalties to be paid for the use of copyrighted works where there is a copyright collective entrusted to collect compensation on behalf of copyright owners.

These royalties are known as tariffs. Tariffs fix the licensing fee to be paid for the use of copyrighted material. The Board only has jurisdiction to examine and rule on proposed rates and reporting requirements; it can't address grievances regarding copyright collectives' internal processes, or how they manage the tariff funds they collect from users of copyrighted material.

The Board also supervises agreements between licensees and collectives, and issues licences when the copyright owner can't be found.

The responsibilities of the Board, under the *Act,* relevant to campus and community radio are as follows:

1. **Certify tariffs** for
    a. public performance or **communication** to the public by telecommunication of musical works and sound recordings; and,
    b. doing any act mentioned in section 3, 15, 18 and 21 of the *Act*, which includes **reproduction** of musical works, sound recordings, performances, and literary works; and,
2. **Set royalties** payable by a user to a collective society, if there is disagreement on royalties, or terms and conditions;
3. **Rule on applications** for licences when the copyright owner cannot be located.

Users (typically objectors that are represented as a group by lawyers) that may be affected by a proposed tariff can respond in two ways:

1. File a formal objection with the Board; and,
2. Negotiate with the copyright collective to reduce the proposed rates and enter into a private agreement, which can be certified by the Board as a settlement tariff.

When an objection is filed with the Board, the copyright collective also has the option of addressing the objection through negotiations and concessions. The objector is expected to formally withdraw the objection if satisfied that the issues raised in the objection are resolved.

If objections are not resolved, the Board holds hearings to determine whether or not proposed tariffs should be certified and at what rates.[83]

What are copyright collectives?

Copyright collectives (also called "collective societies" and "collective management organizations" [CMOs]) are organizations who represent and act on behalf of copyright owners, who join them as members. Collectives usually do not own any copyrights themselves, but grant permissions to use the

works of their members, set conditions for their use, gather money from licensees (like radio stations who want to play songs in a collective's repertoire) and redistribute that money to their rights holders.

Collectives can ensure that copyright owners are compensated and recognized for their work, since it can be hard for rights holders to personally track each instance in which their song is used. Although this is certainly an advantage, copyright holders may find it more difficult to have their exclusive rights (their rights to explicitly say yes or no to a particular use of their work) realized when they join a collective. Once they join, they lose control to personally judge, manage, and permit each individual use of a work.

Different collectives have different methods to calculate, distribute and collect reporting for royalties. See below for specific information about each collective's methodology.

The Canadian music industry has many collectives that rights owners can join, should they choose to do so. Each collective represents a different rights owner (whether that is an author, performer, and/or sound recording maker) and handles different rights (communication rights, reproduction rights and/or public performance rights.

Public performance rights can mean both the **public performance of music** (live performance) *and* the **communication of music to the public by telecommunication**. The latter pertains to radio stations.

In this chapter, only the Canadian copyright collectives that are relevant to music will be discussed. Click here for collectives who represent other types of creative works.

Who are the collectives and what are the tariffs that apply to campus and community Radio?

As discussed, collectives represent several types of work, classes of owners of works, and several rights in those works. The collectives and their tariffs are divided by rights engaged in radio broadcasts of musical works: [1] **communication rights**, and [2] **reproduction rights**.

COMMUNICATION RIGHT COLLECTIVES

SOCAN

SOCAN

About

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) represents (as the name suggests) **authors**, **composers**, and **publishers** who own copyright in **musical works.** They license works for **public performance** and **communication** uses in Canada. SOCAN members receive royalties for the songs they composed, wrote lyrics to, and/or published, whenever they are performed in public or communicated via broadcast.[84]

A common mistake for authors is thinking that SOCAN is a copyright protection organization. It is not. It is a collective that obtains and redistributes royalties back to its members.[85]

Campus and community radio stations need permission from creators and publishers to broadcast the compositions in which they own copyright. SOCAN's tariff 1B applies to campus and community radio, and ensure that stations don't need to contact every creator and publisher of a song or other work it wants to air.

How to Register

Registering for SOCAN is free for authors of music, who can register here. Registration can be completed easily by clicking the "Apply Online" button under **Music Creators** and answering the application questions. Usually, they will receive a letter within a week of applying which will include the written member agreement. Within roughly four weeks after submitting the member agreement, candidates will receive their member numbers and login information. Creators can then sign into their online account and register their songs.[86]

SOCAN also registers publishers which requires a $50 one-time membership fee. The online application is available here under **Music Publishers**.[87]

Radio stations and other users of copyrighted content need to submit the appropriate music licence form (see tariffs below to find out which forms apply) to SOCAN via email or mail and send payment by cheque to **SOCAN Licensing, 41 Valleybrook Drive, Toronto ON, M3B 2S6**, contact "**Current Accounts"** at SOCAN and pay by credit card, or submit online at **eSOCAN**.[88] Generally, SOCAN must receive forms and payments by January 31 of the year for which the licence is granted, except when the forms and payments are for first time reports.[89]

The Tariffs

AM/FM RADIO BROADCASTING: SOCAN Tariff 1.B: Non-Commercial Radio Stations other than CBC

Tariff 1.B currently **covers AM and FM radio broadcasts only**. This tariff requires campus and community stations to pay 1.9 per cent of their estimated gross operating costs for the incoming year.

Additionally, stations would need to pay any extra money that might be owed based on the difference between the estimated gross operating costs for the previous year and the actual operating costs for the previous year.

NOTE: this tariff will be replaced shortly with a new version that applies to AM/FM broadcasts and Internet webcasts, and also covers simulcasts of AM/FM signals as well as downloadable and streaming archives. The rate will remain the same. This guide will be updated once the new tariff is certified.

For example:
Estimated cost for 2016: $55,000 x 1.9% = $1,045

Estimated cost for 2015: $50,000 x 1.9% = $950

Actual cost for 2015: $51,000 x 1.9% = $969

Therefore: $969 – $950 = $19

And so, this station would pay a $1,064 ($1,045 + $19) tariff for a SOCAN broadcasting licence for the 2016 year.

INTERNET STREAMING: SOCAN Tariff: 22C: Webcasts of Non-Commercial Radio Signals

Internet streaming by a campus and community radio station is covered by Tariff 22.C. This tariff indicates that campus and community stations must pay 1.9 per cent of their estimated gross operating costs for the incoming year, multiplied by the ratio of audio page impressions to all page impressions (if that ratio is provided to SOCAN. If it isn't, 1.9% of gross value is multiplied by a default 0.5%).

NOTE: stations who already include gross Internet operating costs in calculating payments under Tariff 1.B do not have to pay any royalties or report any information under Tariff 22.C.

NOTE: This tariff will no longer apply to campus and community radio stations or non-commercial webcasters shortly once the new version of tariff 1.B comes into effect (see the note on the previous page).

INTERNET STREAMING: SOCAN Tariff: 22F: Non-Commercial Internet Radio

Internet broadcasting by a non-commercial Internet radio station (that is not also an AM/FM station) is covered by Tariff 22.F. This tariff indicates that campus and community Internet stations must pay the minimum fees of $28 per year if the combined SOCAN repertoire use on the site is 20% or less, $79 if the use is 20-80%, and $100 if the use is 80% or more.

NOTE: this tariff will no longer apply to campus and community Internet radio stations shortly once the new version of tariff 1.B comes into effect.

How to report

Campus and community stations are asked to submit logs of the music they've played for one to four periods of 3-4 days per year. This is not specified in Tariff 1.B, but is established through industry practice. Tariff 22.C specifies that SOCAN can make a written request from the user for musical reports in the form of logs.

NOTE: In practice this is not relevant to campus or community stations because they are not required to pay Tariff 22.C if they include their annual Internet-related.

NOTE: The number of survey periods each station has to fulfill each year is tied to the level of their gross annual operating costs. Stations with lower costs are only surveyed for one 3-4 day period per year. Those with higher costs are surveyed quarterly.

SOCAN does not monitor every minute of airplay, so some music creators and publishers may not receive royalties through SOCAN despite receiving airtime. Campus and community stations are not responsible for compensating these artists if the station has a SOCAN licence.

The logs are inputted into SOCAN's system where an auto-match program will match the song title, recording artist, and the song writer.

For more information, check out SOCAN's website.

RE:SOUND

MUSIC LICENSING COMPANY

RE:SOUND

About

Re:Sound (formerly, the Neighbouring Rights Collective of Canada (NRCC)) represents **performing artists** and **record companies** who own copyright in **sound recordings, and performer's performances.** They license works for **performance** and **communication** uses in Canada.

Campus and community radio stations need permission from performers and sound recording makers to webstream the recorded performances in which they own copyright over the Internet, which is obtained by paying Tariff 8. They also need to pay royalties to those rights holders for broadcasting their works. The royalty rate is set by the Copyright Act and the money is collected annually by Re:Sound.

How to Register

There are two ways for performers and makers to register with Re:Sound. The easiest is likely registering directly with Re:Sound, but this option is only available for those who are not already registered with another performing rights organization. As the umbrella collective that gathers royalties from licensees, performers or makers can also register with one of Re:Sound's member organizations who will then redistribute the monies collected by Re:Sound.

How to register for Performers:

Performers that are not already registered with another performing rights organization can register directly with Re:Sound. Otherwise they can join one of the following three Re:Sound member collectives:

ACTRA Recording Artist's Collecting Society (RACS):
To register, performers need to fill out the online application.

If a band wants to be represented by RACS, all members of the band must register separately before the band will receive royalties from the collective.[90]

Membership registration is free but a percentage of the collection will be used to cover administrative fees.

Musicians Rights Organization Canada (MROC)
First, performers must download, fill out, and return the appointment and authorization form found here.[91] Once registered as a member, the performer must submit the **Repertoire Registration** form (either by fax, mail or through the website) of the songs they want MROC to collect royalties for. The Repertoire Registration form can be accessed at the bottom of the link just provided.[92]

Artisti
To register, performers sign Artisti's **Agreement on Assignment of Performance Rights** and complete its Performer's Initial Declaration.[93]

Once a member, performers should declare all the songs that they have performed by completing the **Declaration Appendix** form.[94] To find out more, visit the Artisti website.

Membership registration is free but a percentage of the collection will be used to cover administrative fees.

How to register for makers:
Re:Sound has the following two member collectives that makers can join:

CONNECT (formerly the Audio-Video Licensing Agency Inc. (AVLA))
To register for this society, sound recording makers need to fill out the application form. After signing up with CONNECT, members should submit their repertoire of all the material to which they have rights. This repertoire submission can be found here.

Membership registration is free but a percentage of the collection will be used to cover administrative fees.

Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ)
This collective focuses on sound recording makers and video makers from Quebec. To register, sound recording makers need to sign the "Agreement Respecting the Assignment and Licensing of Sound Recordings and Videograms with SOPROQ" form. They should declare the songs to which they have sound recording rights (or video rights) to and keep this repertoire up-to-date.

Membership registration is free.

How to register for radio:
See How to report, below.

The Tariffs

AM/FM BROADCASTS: Section 68.1(1) of the Copyright Act (not a tariff)

Re:Sound does not have a public tariff which applies to the **AM/FM radio broadcasts** of non-commercial radio stations. However, non-commercial AM/FM radio stations are required to pay $100 in yearly royalties according to section 68.1 (1) of the *Copyright* Act, and that money is collected by Re:Sound.

NOTE: A royalty is a payment by a user to the copyright holder for the use of the material. The fees paid under tariffs are royalties. In this case the amount of royalties was decided by the federal government and inserted into the Copyright Act. It did not go through the Copyright Board certification process, so it is not called a tariff.

INTERNET STREAMING: Re:Sound Tariff 8

Re:Sound *does* have a tariff which applies to **Internet streaming** of non-commercial radio (including streams by both AM/FM and Internet-only stations). Tariff 8 is a simple licence for non-commercial webcasters, which requires royalties of $25 yearly for all webcasts. A webcast means communication of a file to a device via the Internet, where the file is intended to be reproduced *only* to the extent required to allow listening at the same time as communication (otherwise known as a "stream").

NOTE: This tariff was certified back to 2008, so stations are required to pay $25 per year starting that year (or later if they were not yet broadcasting in 2008) to the present.

Tariff 8 sets out specific reporting requirements, including that a non-commercial webcaster submit a description of the webcast services they offer or intend to offer, along with payment, to Re:Sound. Non-commercial webcasters are not subject to detailed reporting requirements.

How to report

There is no registration required for non-commercial radio stations to license Re:Sound's repertoire—they are licensed automatically by paying the correct, current, applicable rates.

For AM/FM broadcasting, Re:Sound invoices stations who pay the $100 *Act*-set rate. For Internet streaming under tariff 8, stations should fill out the reporting form and submit it to Re:Sound by email.

NOTE: Stations can also wait for Re:Sound to send them an invoice rather than filling out the reporting form. All non-commercial stations will be required to pay for all years between 2008 and the present in which they were broadcasting and have not yet paid.

REPRODUCTION RIGHT COLLECTIVES

CSI (CMRRA-SODRAC Inc.), CMRRA and SODRAC

About

The Canadian Musical Reproduction Rights Agency (**CMRRA**) represents music **publishers** who own copyright in **musical works**. They license these works for **reproduction** in Canada. Their repertoire covers roughly 75% of music recorded and performed in Canada. Licensing is done on a per-use basis. In lieu of a tariff, CMRRA has a private agreement with the NCRA/ANREC licensing member stations to make reproductions for radio broadcasting purposes.

The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (**SODRAC**) represents (as the name suggests) Canadian **authors**, **composers** and **publishers** who own copyright in **musical works.** SODRAC has a tariff agreement with campus and community radio, authorizing stations to make as many reproductions as is needed for radio broadcasting purposes only. The reproductions can be remixed, compiled, or used in a medley. Moral rights are always reserved for transformation of these works, so stations should use caution when doing so, to ensure that they are not remixing or using the work in a way that would prejudice the reputation of the artist. Note that they cannot be used for *any other purpose*.

NOTE: In practice, SODRAC has only imposed the tariff on French and bilingual-licensed stations because SODRAC's repertoire consists of French language musical works.

CSI is a joint venture between CMRRA and SODRAC. Both collectives represent **reproduction** rights for **musical works**. They offer mechanical licences that are issued to allow for reproduction of audio recordings in physical media like CDs, cassettes, and vinyl. They also offer licences to radio stations allowing for the reproduction of songs relating to non-physical products, either online (music downloads, streaming, and webcasting) or through broadcast (radio or satellite).[95]

SODRAC Reproduction Tariff No. 3.B.

In 2003, the Copyright Board certified this tariff, authorizing SODRAC to collect royalties for the reproduction of musical works in SODRAC's repertoire. The tariff is certified for 2001-5, but like all tariffs, until new ones are certified, the old agreements continue to apply.[96] This means that stations should account for these rates to continue, with an eye to all proposed tariffs.

Under this tariff, reproductions can be remixed or used whole or in part, compiled or used in a medley, montage or mix. Moral rights are always reserved for transformation of these works, so stations should use caution when doing so, to ensure that they are not remixing or using the work in a way that would prejudice the reputation of the artist. These reproductions *cannot* be used for *any other purpose* beyond broadcasting purposes.

The tariff rate is $250 and is paid on January 1st of each year. Payment of this rate automatically grants a station the licence to reproduce works in SODRAC's repertoire.

NOTE: SODRAC's repertoire mainly or entirely consists of French language music, so in practice SODRAC has only invoiced French and bilingual-licensed stations for this tariff and English-licensed stations have not paid it.

How to report

To open a file and receive a licence, a station can fill out a form and submit it to SODRAC. The tariff does not specify the reporting period, but asks that stations keep "all accounts and records from which information required under this tariff can easily be ascertained for a period of two years", and "Accounts and records and logs of a radio station may be audited by SODRAC during normal business hours and on reasonable notice." Stations should therefore keep ongoing accurate logs of their plays.

CMRRA Broadcasting Tariff: Private Agreement / Tariff No. 3

In 2007, the NCRA entered into a private agreement with the CMRRA. CSI has several proposed tariffs covering this right for the years 2011-2016, but none have yet been certified by the board.

The existing agreement requires calculations based on the per cent of a station's gross annual operating expenses. As of 2007, the rates for English stations were as follows:

Less than $625,000 = 0.14%

More than $625,000 = 0.28%

More than $1,250,000 = 0.42%

And the rates for French or low-use[97] English stations were as follows:

Less than $625,000 = 0.06%

More than $625,000 = 0.12%

More than $1,250,000 = 0.18 %

And the rates for low-use[98] French stations are as follows:

Less than $625,000 = 0.03%

More than $625,000 = 0.05%

More than $1,250,000 = 0.08%

NOTE: Although stations do presently owe these rates annually dating back to 2007, CMRRA has not attempted to collect payments from any NCRA member stations since 2008 and to the NCRA's knowledge no members have paid. The NCRA has requested that CMRRA forgive unpaid amounts from past years in all letters objecting to CMRRA's newer proposed rates.

NOTE: "low use" for CMRRA purposes means that a station broadcasts works in SOCAN's repertoire less than 20% of its total broadcast time. No NCRA members have ever fallen into this category to date because all rely heavily on SOCAN artists.

How to report

Royalties are due on January 31st of the year following that for which they are being paid. With payment, stations must send CMRRA a declaration of their gross operating costs. With respect to the reporting obligations, the 2007 agreement requires stations that pay under $2000 in yearly royalties (which applies to all campus and community stations) to report on their broadcast content on 4 days per year, not necessarily consecutive. In fulfillment of this obligation, CMRRA agreed to accept the same reports that stations submit to SOCAN.

NOTE: In practice CMRRA has never contacted any campus or community stations to request that they submit reports to fulfill this requirement.

Robin and Cheyenne pose for the camera at CKUW, University of Winnipeg's campus station. Photo by: Robert Schmidt

Chapter Six

Campus & Community Stations and Copyright FAQs

Angus Wright at CKCU, Ottawa. Photo By: Luke Smith

Why do campus and community stations need to be concerned with copyright?

Ideally, every Canadian would be familiar with copyright law, because we create and use copyrighted material nearly every day; from our morning alarm song to the book we curl up with in bed.

However, campus and community radio stations *must* be familiar with copyright law since they make and use copyright protected works (such as songs) and make them all publicly available through broadcast.

Songs can engage multiple rights (reproduction, communication, and public performance rights) potentially owned by multiple rights holders. Radio broadcasts can be equally, if not more, complex, since a single broadcast can involve reproduction, communication, public performance, *and* broadcast communication signal rights. It can get more complicated, still, if that broadcast is made available online, is streamed, or is made downloadable as a podcast. And moral rights are always potentially engaged, if the author disagrees with how their work is used (though, moral rights are very infrequently litigated in Canada.)

This section will explain the copyright basics for campus and community radio stations.

What is the broadcast communication signal right?

Described earlier in this handbook, a special set of rights applies solely to broadcasters (whether radio or TV stations). These rights can be found in section 21(1) of the Canadian *Copyright Act* (the "*Act*") and are referred to as "communication signal" rights. This section of the *Act* gives broadcasters the rights to fix (that is, permanently record) their broadcast signal and the right to allow another broadcaster to simultaneously rebroadcast that same signal.

Note that a radio show is not protected by copyright if it was not recorded. If a listener is the first to record the program, technically the listener owns the recording rights.[99]

However, CRTC Regulations, under section 8(5)(a) of "Radio Regulations, 1986 (SOR/86-982)", require stations to maintain an audio log (an audio recording) of their broadcast for at least four weeks after a program airs. Thus, stations generally own the copyrights to their audio recordings, unless an audio logger wasn't working and someone else recorded it first. Nonetheless, stations only have automatic recording rights and only to the content recorded at the station.

Source: CC0 Public Domain via lifeofpix.com

Do employees or volunteers of a campus or community station retain any rights to their script and/or on-air performance of it?

Typically, under the *Act*, employees do *not* retain rights to works they author in the course of their employment. This rule comes from section 13(3) of the *Act*, which states that work made in the course of employment—by someone employed under a contract of service or apprenticeship—belongs to that employer, unless there is a contract in place that stipulates otherwise. This rule applies to employees of campus or community radio stations. An employee of the station who hosts a show, writes a script, or participates in any other on-air performance, might not retain rights to their contribution. They will likely still be considered the legal first *author* of that work, but unless a prior agreement between the employees and employer states otherwise, the station will own the rights.

Whether ***volunteers*** own copyright is a separate issue. Since the *Act* doesn't specify whether a volunteer counts as an employee, it is possible that they retain copyright in works authored while volunteering. The totality of the circumstances, and existence of a hiring contract, will help determine if a volunteer is an employee. An unpaid volunteer without a hiring contract who determined his/her own hours would likely be treated as the first author and owner of the copyright in their work under the *Act.* A volunteer who signed a contract, attended staff meetings, reported how they spent their time, and received payment for their time may be considered an employee, and the radio station will be treated as the owner of the copyright in their work under s. 13(3) of the *Act.*[100] In order to ensure that copyright is retained by the original owner, it would be helpful to have a contract that declares them as such.

Who has rights to material produced outside of the station?

When a person not employed by the station submits material, the general rules of traditional copyright and neighbouring rights (if any) apply.

For traditional copyright, section 13(1) of the *Act* states that the author(s) first owns the copyright.[101] This applies to the person(s) who writes the book, composes the song, choreographs the play, and all other producers of creative content. But, the rights holder may be someone else, if the work was made while they were an employee, if the work was made for the government, for a client as a freelancer, or merely if the author decided to transfer their rights to someone else.

For neighbouring rights, different rules apply. The owner of a sound recording is the "maker" (whoever funded and/or arranged for the creative work to be made). This is often a record label or a similar corporation. The owner of a performance is the performer. However, since many performances are fixed as sound recordings, the ownership will likely transfer to whomever arranged for that recording to be made. Finally, the broadcaster owns the signal they broadcast.

The rights owned by these authors and owners don't necessarily transfer to the station when a physical object that contains (or is) the work is given to the radio station. For example, if singer/songwriters mails a demo of their new album to a campus station for broadcast, the act of giving the station a copy of the material does not transfer the singer/songwriters' (and all other rights owners) rights in their songs to the station. When authors voluntarily submit work to be aired, they are simply consenting to the radio station communicating that particular recording. Authors are exercising their exclusive rights by granting the radio station permission to air their work.

It may be easier to understand with an artwork example. A gallery doesn't own copyright in a painting just because the artist gave them the canvas it was painted on. The gallery can hang it on their wall, even charge admission to the gallery, but they have no right to reproduce the painting, sell copies, distribute a high-resolution image on the Internet, or to print it on T-shirts (unless, of course, the artist permits them to do so with a licence, which they often do!)

However, radio stations still have rights when they play content they do not own. This is because radio stations have communication signal rights, which are the rights to fix and allow other broadcasters to rebroadcast their signal.

Photo by Luke Smith at CKCU, Ottawa

If someone reads a poem or story on air that they have written, what rights does the station and the reader have?

It depends. If they are employees of the station and wrote the story during the course of their work (for example, a radio host's manager asked her to write and recite a poem relating to the subject of the show she hosts), then by virtue of being the employer, the station owns all traditional copyrights in that work, and they also own the communication signal right.

On the other hand, if an author—employee of the station or not—wrote a story at home, on their own time, they would own all traditional copyrights to the work, while the radio station would simply hold the communication signal right.

Thus, even if an employee of the radio station read the work authored by a non-employee (assuming the radio station has acquired permission or is a licensee of the appropriate copyright collective) then the radio station would own the communication signal right and the public performance right to their unique performance of the work. Meanwhile, the author would retain every copyright they had in that work.

Note as well, that *if* the employee or volunteer *does* hold copyright in their work (ie., it was not made in the course of their employment) then they have the sole right to record the performance of their work. There *are* exceptions to infringement, in cases where this does occur, on the terms set out in sections 39.8 and 39.9 of *the* Act, for the making of ephemeral recordings and pre-recordings for the purpose of transferring a sound recording; or a performer's performance or work embodied in a sound recording, solely for the purpose of transferring it to a format appropriate for broadcasting. So, while the station holds a broadcast right to the performance, they do *not* own the copyright in any recording made of that performance without authorization or license by the copyright owner.

Can a radio station play audio from a sound recording brought from home by an employee or volunteer of that station, without any copyright concerns?

The most succinct, accurate answer is **no**, as there are *always* copyright concerns. *Many* different concerns can arise depending on the nature of the recording, its author, and the owner(s) of any particular rights to that recording and its underlying musical composition or literary source.

However, radio stations who do their due diligence to ensure they have permission can likely play many recordings brought from home. Radio stations can air songs they have permission or licence to broadcast. Where they have a license to broadcast, this means that before airing music, comedy, spoken word, or any audio from a sound recording, a radio station should check if that music is found in the repertoire of a collective society from which the NCRA has a license. Otherwise, if the recording is not found in the collectives' repertoire and the track or album has "all rights reserved" or lacks any explicit Creative Commons permissions, radio stations should seek written permission from its rights owners.

A more detailed explanation follows (note: many of these concepts are covered earlier in the handbook, feel free to reference those sections and the glossary for better understanding):

What is protected?

To understand why there are always concerns, it is important to understand that a recording—even one legally bought by an employee or volunteer of the station—has a layer of separately protected copyright elements: (1) the *musical work* (the composition and the lyrics); (2) the *performance* of the work by the

performer/band-members; and, (3) the *recording* of the performance. These are "*the things"* that are protected by copyright (and, if a recording is broadcast, that too is a protectable element. However, unless you are re-broadcasting, this will not apply).

What is the scope of that protection?

The *things* protected by copyright are given a bundle of rights, which explains the *ways* in which the thing is protectable. For the purposes of answering this question, the relevant rights in the bundle are the right to **communicate (or "perform")** and the right to **reproduce (or "copy)** all three of these copyright "things" (sections 3(1), 15 & 18 of the *Act*.) Further, these **rights** can pertain to countless **circumstances**. For example, the right to communicate via a radio broadcast is not treated identically as the right to stream that very same broadcast over the Internet.

Administration of the *communication* right (section 67 of the *Act*)

The owner of the copyright in the performance and the sound recording of that performance has a normal right of reproduction. This means that owners can prohibit copies of the recording from being made.

However, they *only* have the right to receive equitable remuneration for communication of that performance. So, they cannot prohibit **broadcasts**. But, they are still entitled to equitable remuneration for those broadcasts. SOCAN represents authors for the communication of musical works, and Re:Sound acts as representative for the communication of those same performances and recordings of musical works.

So, yes, if the recording the employee wishes to play is part of SOCAN's repertoire, they may play it. Under SOCAN Tariff 1.B (see p. 41), a non-commercial station is licenced to perform at any time, and as often as desired, any or all of the works in SOCAN's repertoire, provided they pay the required fee (1.9% of stations gross operating costs in the year covered by the licence).[102] SOCAN's repertoire is searchable online, and they are mandated by section 67 of the *Act* to answer all reasonable requests from the public for information about its repertoire. So, it is up to the station to do its due diligence and ensure that the recording is playable material.

However, there remains the matter of Re:Sound. There is no certified tariff binding Re:Sound to collect from non-commercial radio. There are no certified tariffs binding any of Re:Sound's member collectives. There is a proposed tariff (Re:Sound Tariff 1.B for non-commercial radio) which includes rates of 2% of stations' gross operating costs, but it is prefaced by an acknowledgment that community systems are only required to pay $100 per year pursuant to s. 68.1(1)(b) of the Copyright Act. In either case, under the proposed tariff, a station is authorized to communicate, at any time and as often as they like, any or all of the works in Re:Sound's repertoire.

NOTE: In practice Re:Sound has treated all campus and community radio stations as "community systems" for purposes of this $100 fee, so it is unknown who the new proposed tariff 1.B would apply to.

In summary: if the recording belongs to both SOCAN and Re:Sound's repertoire, the station can perform the song as a *communication* to the public. Unfortunately, no collective society represents 100% of the available repertoire out there, so due diligence is required. Unfortunately, users have no means, besides checking the website or contacting the collective organization, to establish in advance of playing that a

work does *not* enjoy protection in Canada by that organization. Furthermore, even if the recording passes muster as a licensed work for communication purposes, copyright concerns do not end there.

Administration of the *reproduction* right (section 70.12-70.191 of the *Act*)

Even if the recording and the performance are okay to communicate, the right to copy, for most Canadian creators, is protected through alternate representatives: CMRRA and SODRAC represent authors of the **musical work** for the reproduction of those works, while the reproduction of the **recording** and **performance** are covered by any number of different collectives, like CONNECT (previously, AVLA), ACTRA RACS, MROC (formerly the AFM), CRIA and for Quebecois works, ArtistI, COPIBEC and SOPROQ. There are currently no certified tariffs between these collectives for non-commercial radio.

So, yes, if the work on the recording the employee wishes to copy is part of CMRRA or SODRAC's repertoire, they can reproduce it. Under SODRAC Tariff 3.B (see p. 45), a radio station may reproduce works in that repertoire and use those copies as often as needed for its broadcasting purposes during the year. It is only authorized to use these copies for radio broadcasting, and only provided it pays the annual $250 royalty rate, accounts, records, and forwards their programming (radio logs). Additionally, CMRRA and NCRA have a private agreement (see. p. 46), and accordingly, if the work is part of CMRRA's repertoire, and is authorized for use by non-commercial radio stations for over-the-air radio broadcasting, it can be reproduced provided the station pays the rate specified in the agreement.

If this sounds complicated, that is because it is. And the burning question remains: what if work is not in all of the repertoires of the collectives representing authors, performers, and makers of works that employees want to copy? Will the station be liable if they copy it anyway? For the communication right, no action may be commenced (without written consent of the Minister of industry) for an infringement if there is no certified tariff.[103] If there *is* a certified tariff, the damages are unlikely to exceed the royalty rates set out in the tariff (meaning that the offending station will merely have to pay royalties that were due anyway). That is the good news. The bad news is that there is still a great lack of clarity about reproduction rights. In the recent *CBC v SODRAC* decision, the court emphasized that a copy is a copy is a copy. And in terms of what happens when a recording is communicated through the Internet, there is no clear answer as to whether a reproduction is made which engages the reproduction right. So, a radio station will have to be careful about the extent to which they copy the recordings they wish to air.

NOTE: As of first print of this handbook (November 2016), the NCRA/ANREC is developing a national Distribution system for content and any specifics related to copyright will be outlined when that system is completed. Check with NCRA/ANREC staff for more information.

What about music obtained (e.g. downloaded) from an online source such as Bandcamp, SoundCloud, iTunes, or Google Play Music?

All of Bandcamp, Soundcloud, iTunes Store, and Google Play Music prohibit any use that is not personal and non-commercial. These prohibitions remain subject to what the rights owners to the songs have allowed.

So, just like the question above regarding sound recordings, a legally downloaded and/or purchased digital sound file doesn't give the downloader/buyer the right communicate or distribute the file elsewhere. Bandcamp, Soundcloud, iTunes, Google Play Music and others are only given limited rights to

make available, sell and distribute, and communicate those sound files on behalf of the copyright owners.

Still, sometimes there will be a description of the licence—either displaying a Creative Commons licence or an "all rights reserved"—at the bottom of a track or album description. If that licence allows for the broadcasting of the song, then radio stations can air the song with no problem. Otherwise, if the track or album has "all rights reserved" or lacks any explicit permissions, radio stations should seek written permission from its rights owners, or should ensure they are licensees to the appropriate copyright collectives.

What audio can campus and community radio stations stream online?

The same rules (but different tariffs) apply for stations wishing to make audio available online. Those tariffs are SOCAN's tariff 22.C (see p. 41) and Re:Sound's tariff 8 (see p. 44). Under those tariffs, radio stations can "webcast" which means they can communicate a file to a device, over the Internet, where the file is intended to be reproduced *only* to the extent required to allow listening at the same time as communication. In essence, this means that the tariff only authorizes stations to stream recordings, and only those which are represented in Re:Sound's or SOCAN's repertoires.

NOTE: SOCAN has in practice accepted that tariff 22.C covers downloadable archives, which refers to chunks of audio recorded from a station's terrestrial broadcast or simulcast. SOCAN believes that most stations that offer this service offer either entire programs or shorter chunks of audio for download but do not offer individual songs for download. The new SOCAN tariff 1.B that will be in force shortly will cover simulcasting, webcasting, and downloadable archives.

There are no tariffs for podcasting, and we don't expect any to be introduced in the foreseeable future. This means that stations should be extra careful about posting content online. It's acceptable to stream content online, and to post archived shows for manual download, but liability can arise from posting individual songs for download (unless additional online music services tariffs are paid), and offering subscription-based podcasts without obtaining permission from copyright holders (there are no podcasting tariffs and permission must be sought from copyright holders directly).

NOTE: What does this mean for podcasting? It is technically illegal without consent, however;

If you make a podcast available on your server without permission and the copyright owner finds out, the first thing the owner of the copyright (i.e. who made the song), would probably do is ask you to take it down by sending you a "cease and desist" request.

If you fail to comply, the owner may sue you for copyright infringement. The amount they could recover from you would be fairly small, so most would not bother to proceed with a lawsuit because the costs would outweigh the benefits. However, defending against a lawsuit can be very expensive even if the plaintiff is likely to lose.

It is up to each station or group to decide if they wish to put their station at risk for podcasting issues due to illegally posted content.

To NCRA knowledge, lawsuits in our sector are very rare, and so far only a few stations have been asked to take podcasts down.

Can a station's hosts read content from material created elsewhere and written by someone not associated with the station on air?

A radio station does *not* have the right to read a significant portion of the material on air without written permission from the writer, publisher, and all other possible rights holders of the material.

However, the *Copyright Act's* fair dealing exception applies to all copyrighted content. If the material is being read for criticism, review, news reporting, parody, or satire, a necessary amount can be aired.[104] For criticism, review and news reporting, attributing the rights holders is essential.[105] Conversely, there does not need to be any attribution to a source for the purposes of criticism or satire, as outlined in section 29 of the *Act.* (See also p. 33 and "Can stations play clips from movies and TV shows?" on p. 55.)

In addition to falling under one of the purposes outlined in section 29 of the *Act,* the use of the work must also be fair. The Supreme Court of Canada has outlined six factors that can be taken into consideration when assessing whether or not the use of the work was fair. These factors are guiding principles and may not be applicable in all situations.[106]

Can campus and community radio stations play sound clips from online video or audio streaming sites (such as those found on YouTube)?

Each video streaming site has its own unique terms of use policy. So, it depends on where the video or audio is from. Stations wishing to use a clip should first read and understand the terms of service or terms of use concerning that particular website/aggregator. It is more likely than not that such content aggregators' terms will limit (not permit) users' abilities to recommunicate content to the public. Recommunication is not the same as embedding the YouTube or SoundCloud link on another website. To avoid liability, stations should avoid playing video or sound clips without express permission of the content owner.

As an example, Section 5B of Youtube's Terms of Service state: *You shall not copy,* ***reproduce****, distribute, transmit,* ***broadcast****, display, sell, license, or otherwise exploit any Content for any other purposes without the prior written consent of YouTube or the respective licensors of the Content.* Content can only be accessed for information and personal use as the content was intended, and cannot be downloaded unless there is a "download" option, or similar link, displayed by YouTube for that content. SoundCloud's terms of use similarly limits the communication of content in any way other than through *their* platform.

Can stations play clips from movies and TV shows?

Stations should be cautious about airing content from movies and TV shows. The music *from* a movie or TV show may be licensed in a collective society's repertoire. But the television show or film itself can engage even more copyrights than a song: the author of the work in its entirety (often the director); the scriptwriter, who owns the literary work which is the source of dialogue; the film's scorer, who owns copyright to the score as a musical work; and actors and actresses themselves may even have performer's performance rights.[107]

If a station is still unsure after researching their tariffs, they should contact the copyright collectives and ask them directly.

Although campus and community stations may get away with airing someone else's media file without having the applicable tariff, there is a risk of repercussions from rights owners. It is up to the station's

judgement as to how much of a risk they want to take, but a better way to minimize liability is to consider the fair dealing exceptions available. In the case of radio, this will often come in the form of news reporting, review, or criticism.[108] (See "What is the fair dealing exception?" on p. 33.) The Supreme Court held that it was permissible to use a "trivial" amount of a copyrighted work, so the station should strongly consider how substantial the clip is, and should also assess the content of the clip. If the content comprises a "substantial part" of that work (see p. 19), it will be less likely to be found as fair dealing. A recognizable snippet of dialogue may not be trivial, even if it is just a few seconds long.

Another option is to ask the rights owners directly if they would give permission to the station to air a clip. In that case, the permission should be given in a written permanent form.

NOTE It is important for campus and community stations to know about the latest copyright tariffs, which may change based on rulings by the Copyright Board. Contact the NCRA/ANREC office for details.

Glossary

Attribution

is crediting someone for his or her work. It is one of four elements of a Creative Commons licence.

Author

is the term (and *only* term) copyright uses to refer to *any* creator of a traditional work. Whether a sculptor, painter, songwriter or choreographer, copyright law always calls them **authors**. The author of a traditional work of copyright usually has first ownership of the following: reproduction, public performance, communication, and moral rights. But, often, the first author is not the owner because they have licensed or assigned some or all of these rights away in the pursuit of more efficient exploitation of their creations.

Berne Convention for the Protection of Literary and Artistic Works

was formed in 1885 to extend copyright protection of creators' works to all signatory states. There are 166 signatory states at the time this book was written. Accordingly, ***Berne Convention* country,** means a country that is party to the Convention for the Protection of Literary and Artistic Works concluded at Berne on September 9, 1886, or any one of its revisions including the Paris Act of 1971.[109]

CMRRA (the Canadian Musical Reproduction Rights Agency Ltd.)

is a copyright collective that represents creators and publishers' reproduction rights.

Communication signal

is a radio wave transmitted through space without any artificial guide, for reception by the public.

Communication signal right

is the right for broadcasters (e.g. radio stations) to fix their broadcast signal and to allow another broadcaster to simultaneously rebroadcast that same signal.

Communication right

is the right to communicate a work to the public with telecommunications (broadcast, cablecast, and webcast). Both traditional and neighbouring rights owners can have this right.

Copyright Board of Canada

is an economic regulatory board that determines how much a tariff will be for the use of copyrighted works where there is a copyright collective to collect compensation on behalf of copyright owners.

Copyright collectives

gather money from licensees and redistribute it to their member copyright owners.

Copyright term

for the traditional copyright owner lasts from the moment of creation until 50 years from the December 31 of the year in which the owner died.

Performers and sound recording makers enjoy a 50 year copyright term from when the work was fixed or, if published, the earlier of 70 years from the date of publication or 100 years from the date of fixation.

The broadcast communication signal right lasts for 50 years from the last day of the calendar year from when the signal was broadcast.

Creative Commons licences

are a group of licences that allow creators to waive some of their copyrights so they don't need to personally give permission for others to use their creative work.

CSI (CMRRA-SODRAC Inc.)

is a joint venture between the Canadian Musical Reproduction Rights Agency and the Society for Reproduction Rights of Authors, Composers, and Publishers in Canada. Both collectives represent creators and publishers' reproduction rights.

Economic rights

are rights to monetary compensation. Reproduction, public performance, and communication rights are all economic rights. Both traditional and neighbouring rights owners can have economic rights.

Fair dealing exceptions

include research, private study, news reporting, criticism and review, education, and parody and satire. Uses of copyrighted works may be permissible if they are intended for the above reasons and are also fair. The fairness analysis is conducted on a case-by-case basis, but six factors that *can* be considered, provided the existence of an appropriate context, are outlined in *CCH Canadian Ltd. v. Law Society of Upper Canada* and reiterated in *Alberta (Education) v. Canadian Copyright Licensing Agency and SOCAN v. Bell Canada* (2012).

Fixation

is required in order for the work to be considered copyrightable in Canada. A work is fixed if it is in a physical and permanent material form. This includes being stored digitally on a hard drive.

Moral rights

protect the reputation and honour of the creator of a work. They are non- economic rights and cannot be transferred except to creators' heirs after death. Moral rights include the right to be attributed to the work where appropriate and the right of integrity to the work.

Traditional copyright owners and performers have moral rights.

Nationality

of the creator is one factor considered when determining if the work is copyrightable in Canada. The creator must be: a Canadian citizen, Canadian resident, a citizen or subject of a *Berne Convention* country, a citizen or subject of a *Universal Copyright Convention* country, a citizen or subject of a *World Trade Organization* member, or a citizen or subject of any other country that the Minister may have extended copyright protection to.

"Neighbouring rights"

is the umbrella term used when describing the rights of the performer, the sound recorder, and the broadcaster.

No Derivatives

is a term used by Creative Commons to indicate that a work cannot be altered in any way.

Non-Commercial

is a term used by Creative Commons to indicate that a work can be used as long as the purpose is not for monetary gain.

Originality

is the use of a significant amount of skill and judgement to create a work. It is required in order for the work to be considered copyrightable in Canada.

Performer's performance

refers to a performance of an artistic work, dramatic work or musical work, whether or not it was previously fixed, and whether or not the work's term of copyright protection expired. It also refers to a recitation or reading of a literary work, whether or not copyright protection expired. Lastly, it refers to an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work.

Podcast

Is a digital audio file made available on the Internet for downloading to a computer or portable media player, typically available as a series, new instalments of which can be received by subscribers automatically.

Public domain

is a term used to represent any works that are available to the public because their intellectual property rights are expired, have been forfeited, or are inapplicable. Works in Canada are generally in the public domain 50 years from the last day of the calendar year that the creator (or creators) died.

Public performance right

is the right to perform the work or any substantial part of the work in public either as a live performance or a performance of a recording. Both traditional and neighbouring rights owners can have this right.

Reproduction right

is the right to copy or reproduce a work. The reproduction right is an economic right. Both traditional and neighbouring rights owners can have this right.

Re:Sound

is a copyright collective that represents the public performance and communication rights of performers and sound recording makers.

ShareAlike

is a term used by Creative Commons to indicate that a user of a work must use the same Creative Commons licence as the original work.

SOCAN (Society of Composers, Authors and Music Publishers of Canada)

is a copyright collective that represents its creator and publisher members' public performance and communication rights.

Sound recording *maker*

is the person or people responsible for the recording (fixation) of a musical work (typically this means *economically* responsible).

Tariff

is a fixed tax or royalty that is to be paid for a particular product or service or the right to use an asset that belongs to someone else. For instance, the Copyright Board of Canada determines the tariffs to be paid by campus and community radio stations to copyright collectives that represent various rights owners of music and other audio works.

Transferable rights

are economic rights (reproduction, public performance, and communication rights). They can be reassigned from one person to another person or organization (such as a label).

Universal Copyright Convention

backed by UNESCO, came into force in 1955 as an alternative international copyright agreement to the Berne Convention. Countries that did not agree with the Berne Convention, including the Soviet Union and the United States, created this alternative agreement. The Berne Convention countries joined the Universal Copyright Convention so their copyrights would extend to non-Berne Convention countries.

User-generated content exception

allows for non-commercial use of publicly available work, and applies to public performances, translations, adaptations, and communications to the public.

Works

include copyrightable literary, artistic, and dramatic creations. Ideas, Facts, inventions, and processes are not copyright protected works.

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END NOTES

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[81] Laura J. Murray & Samuel E. Trosow, *Canadian Copyright: A Citizen's* Guide at 85.

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