

A SUMMARY OF SOME DISTINCTIONS BETWEEN CANADIAN AND AMERICAN COPYRIGHT LAW AND PRACTICE

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INTRODUCTION

In recent years there has been a lessening of the distinctions between the Canadian and American systems of copyright protection. Nevertheless, there are still some differences between the two systems of law and understanding those differences is important because of their impact on the extent of protection available for protected works. More and more, we practitioners have to consider copyright law in an international context. This lecture will attempt a succinct comparison of U.S. and Canadian Copyright law and practice.

In this paper, we have attempted to limit the discussion to the less technical aspects of this subject matter and concentrate on elements which comprise the essence of copyright.

1. PROTECTED WORKS

TABLE 1.1 COPYRIGHT SUBJECT MATTER

US Copyright Act (section 102)	Canadian Copyright Act
Protected works are "original works of authorship fixed in any	The Canadian Copyright Act does not specifically require the

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<p>tangible medium of expression now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or a device".</p>	<p>fixation of the work. However these condition is implicit and well established in Canadian case law. The criteria of originality is found in Section 5(1) of the Copyright Act, since that section states that Copyright subsists in every <u>original</u> literary, dramatic, musical and artistic work . iii</p>
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Comments : In the US as well as in Canada, protected works are original works, fixed in any tangible medium of expression. A work will usually be considered original if it is independently created (as opposed to copied from other works) and if it possesses at least a minimal degree of creativity.

TABLE 1.2 CATEGORIES OF PROTECTED WORKS

US Copyright Law (sections 101, 102)	Canadian Copyright Law (section 2)
<p>"literary works": works other than audio-visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects in which they are embodied.</p>	<p>"literary works": includes tables, computer programs, and compilations of literary works.</p>
<p>"musical works"(including any accompanying words) – undefined</p>	<p>"musical works": any work of music or musical composition, with or without words, and any compilation thereof.</p>
<p>"dramatic works" (including any accompanying music) – undefined</p>	<p>"dramatic works": includes (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, (b) any cinematographic work, and (c) any compilation of dramatic</p>

	works.
	"artistic works" : includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilation of artistic works.
"works of visual art" means : (a) painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author, or (b) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.	<i>In Canada protected as artistic works in accordance with the above definition only.</i>
"pantomimes and choreographic works" – undefined	<i>in Canada protected as dramatic works</i> - "choreographic work" includes any work of choreography, whether or not it has a story line
"pictorial, graphic and sculptural works" – undefined	<i>in Canada protected as artistic works</i> - "engraving" : includes etchings, lithographs, woodcuts, prints, and other similar works, not being photographs.

	<p>- "photograph": includes photolithograph and any work expressed by any process analogous to photography.</p> <p>- "sculpture": includes cast or model.</p>
<p>"motion pictures": audio-visual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds if any;</p> <p>and other "audio-visual works": works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material, objects, such as films or tapes, in which the works are embodied.</p>	<p><i>Cinematographic works are protected as dramatic works.</i></p> <p>"cinematographic work": includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack.</p> <p><i>In Canada there is no specific definition of audio-visual works.</i></p>
<p>"architectural works": design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.</p>	<p><i>in Canada protected as artistic works</i></p> <p>- "architectural work": any building or structure or any model of a building or structure.</p>
<p>"sound recordings": works that</p>	<p><i>In Canada sound recordings are</i></p>

<p>result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audio-visual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.</p>	<p><i>not protected as works but as "objects of copyright"</i></p> <p>- "sound recording" : recording, fixed in any material form, consisting of sounds, whether or not a performance of a work, but excludes any soundtrack of a cinematographic work, where it accompanies the cinematographic work.</p>
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Comments : In Canada, in order to be granted protection, aside from being original and fixed, a work must fall within one of the four categories mentioned above that is, literary, dramatic, musical and artistic works. There is no such obligation in the US. The categories of works are enumerated only as examples.

TABLE 1.3 REGISTRATION

US Copyright Act (sections 407,408,410,411)	Canadian Copyright Act (section 53)
<p>Copyright is secured automatically upon creation of the work. Registration is optional (section 408). Although there is an exception. The Copyright Act establishes a mandatory filing requirement for works published in the U.S. .The owner of the exclusive right of publication has a legal obligation to send to the Copyright Office within 3 months of publication two copies for the use of the Library of Congress. Failure to do so can results in fines and other penalties but does not affect the copyright (section 407).</p> <p>There are some advantages of registration like the fact that it</p>	<p>The registration of a work is not obligatory. The copyright is secured automatically upon creation of the work. Nevertheless, registration facilitates the establishment of title in a copyright. It also creates certain presumptions as to the validity of copyright and the veracity of the information found on the registration certificate and the knowledge of third parties of the subsistence of copyright protection. In Canada, registration is not a prerequisite to the taking of an infringement action.</p>

<p>makes public the copyright claim in a work. Furthermore, the certificate of a registration made before or within five years after first publication of the work shall constitute <i>prima facie</i> evidence of the validity of the copyright and of the facts stated in the certificate (section 410).</p> <p>Note that except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and an action brought for a violation of the rights of the author under section 106A(a) - Rights of Attribution and Integrity-, and subject to the provisions of subsection (b) thereof, no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made.</p>	
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TABLE 1.4 UNPROTECTED WORKS

US Copyright Act (sections 101,102(a)(b),105)	Canadian Copyright Act
Are not protected : -unoriginal works -works not fixed in a tangible form of expression.	Same exclusions than the U.S. but are also not protected : works that cannot be classified in one of the four categories of protected works.
Ideas: Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,	Ideas: There is no express provision of this kind in the Canadian Act, however the same exclusions apply as a result of the case law.

<p>regardless of the form in which it is described, explained, illustrated, or embodied in such work (section 102(b)).</p> <p>Only their description, explanation, or illustration is protected.</p>	<p>(see the overall wording of the Canadian Act and its jurisprudence interpretation)</p>
<p>Titles, names, short phrases, and slogans; familiar symbols or design, mere variation of topographic ornamentation, lettering or colouring, mere listings of ingredients or contents.</p>	<p>Titles: In Canada titles are protected as literary works only when they are original and distinctive in very limited circumstances and only when they are original and distinctive and can be say to stand alone as a work.</p>
<p>Works consisting entirely of information that is common property and containing no original authorship (for instance: standard calendars, height and weight charts, tape measures and rules, and lists of tables taken from public documents or other common sources).</p>	<p>In Canada information and data belong to the public domain and therefore are not protected. However works consisting merely of data or information are protected if their selection and arrangement is original - (see "Compilations").</p>

<p>Useful articles : articles having an intrinsic utilitarian function that is not merely to portray the appearance or to convey information, and articles that are normally part of a useful article. American copyright law has taken a strong position against the protection of functional elements. According to <i>Apple Computer Inc. v. Microsoft Corp.</i>, 799 F. Supp. 1006 (N.D. Cal. 1992): "...an article which has any intrinsic utilitarian function" can be</p>	<p>Functionality sections 64 & 64.1:</p> <p>The Canadian Act foresees a very creative solution to the question of functionality and useful articles. The provisions have hardly been interpreted by the Courts and read as follows:</p> <p>Section 64(2) states:</p> <p>"Non-infringement re certain designs (2) Where copyright subsists in a design applied to a useful article</p>
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denied copyright protection "except to the extent that its artistic features can be identified separately and are capable of existing independently as a work of art". " (section 101).

or in an artistic work from which the design is derived and, by or under the authority of any person who owns the copyright in Canada or who owns the copyright in Canada or who owns the copyright elsewhere,

(a) the article is reproduced in a quantity or more than fifty or

(b) where the article is a plate, engraving, or cast, the article is used for producing more it shall not thereafter be an infringement of the copyright on the moral rights for anyone

(c) to reproduce the design of the article or a design not differing substantially from the design of the article by:

(i) making the article, or

(ii) making a drawing or other reproduction in any material form of the article, or

(d) to do with an article, drawing or reproduction that is made as described in paragraph (c) anything that the owner of the copyright has the sole right to do with the design or artistic work in which the copyright subsists."

Section 64.1 reads as follows:

"Non-infringement re useful article features

64.1 (1) The following acts do not constitute an infringement of the copyright or moral rights in a work:

(a) applying to a useful article

	<p>features that are dictated solely by a utilitarian function of the article;</p> <p>(b) by reference solely to a useful article, making a drawing or other reproduction in any material form of any features of the article that are dictated solely by a utilitarian function of the article;</p> <p>(c) doing with a useful article having only features described in paragraph (a), or with a drawing or reproduction made as described in paragraph (b), anything that the owner or the copyright has the sole right to do with the work; and</p> <p>(d) using any method or principle of manufacture or construction.</p> <p>Exception</p> <p>(2) Nothing in subsection (1) affects</p> <p>(a) the copyright, or</p> <p>(b) the moral rights, if any, in any sound recording, cinematograph film or other contrivance by means of which a work may be mechanically reproduced or performed.</p> <p>S.C. 1997, c. 24, s. 40.</p>
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Comments:

"Despite s. 64.1, there are still differences in the approach taken under Canadian and American law. In the US copyright is denied to functional works except to the extent that "artistic features can be

identified separately". In Canada, copying of functional works is exempted for features that are dictated "solely by utilitarian function". There are two differences. Under the American approach, a court must determine whether there are any separate artistic features. Under the Canadian approach, a court must determine whether there are any solely utilitarian features. This difference in "perspective" could lead to a difference in the scope of protection. The second difference is that the American approach excludes functionality from copyright protection, while the Canadian approach exempts the copying of functional features from infringement. In Canada, copyright subsists, but an exemption is provided. In the US, copyright does not subsist, eliminating the need for an exemption. This difference could also lead to a difference in the scope of protection, because exemptions tend to be construed more narrowly." (Morgan, *supra* note ii at 186)

TABLE 1.5 PROTECTION OF COMPILATIONS

US Copyright Act (sections 101,102,103)	Canadian Copyright Act (sections 2 and 2.1)
Section 103 of the US Copyright Act provides that the subject matter of copyright as specified by section 102 includes compilations and derivative works. However the interpretation given to what is protected in a compilation is quite different in Canada and in the US.	
A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, co-ordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term	A "compilation" means: (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data (section 2).

<p>"compilation" includes collective works (section 101).</p>	
<p>(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully;</p> <p>(b) The copyright in a compilation or derivative work extends only to material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.</p>	<p>(1) A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the categories making up the most substantial part of the compilation;</p> <p>(2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral right in respect of the work (section 2.1).</p>

Comments :

According to the decision rendered in *Feist Publications, Inc. v. Rural Tel. Services Co.* 499 US 340 (1991), the ambit of protection afforded to compilations in the US is relatively narrow and limited to the original characteristics of the compilation such as selection and organisation.

In Canada, the recent decision of the Federal Court of Appeal in *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1998) 2 C.F. 22, has brought the Canadian position in line with position traditionally adopted by the U.S. case law on the subject..

TABLE 1.6 COPYRIGHT AND THE NATIONAL ORIGIN OF THE WORK

US Copyright Act (sections 101, 104)	Canadian Copyright Act (sections 2.2 (1), 5)
<p>1. Publication - definition -</p> <p>"publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication (section 101).</p>	<p>1. Publication – definition-</p> <p>"Publication" means :</p> <p>(i) making copies of the work available to the public (ii) the construction of an architectural work, and (iii) the incorporation of an artistic work into an architectural work .</p> <p>Publication does not include the performance in public, or communication to the public by telecommunication, of a work, the exhibition in public of an artistic work or the issue of photographs and engravings of sculptural and architectural works (section 2.2(1)).</p>
<p><i>Comments</i> : In the US, publication appears to have a commercial connotation. This is not the case in Canada.</p>	
<p>2. Unpublished works and their national origin - protection -</p> <p>Protection is available for unpublished works regardless of the nationality or domicile of the author, if they satisfy the criteria of originality and fixation (section 104(a)).</p>	<p>2. Unpublished works and their national origin -protection-</p> <p>According to section 5(1)(a) of the Canadian Copyright Act, copyright shall subsist in Canada, in every original literary dramatic, musical and artistic work, whether published or unpublished, if the author was, at the date of the making of the work, a citizen or subject of, or a person resident in, a treaty country.</p>
	<p>In a cinematographic work, copyright shall also subsist if the maker is, at the date of the making of the work, (i) a citizen</p>

	or subject of, or a person resident in, a treaty country, or (ii) in the case of corporation, if it had its headquarters in a treaty country (section 5(1)(b)).
3. Published works and their national origin - protection - (section 104(b))	3. Published works and their national origin - protection - (section 5)
<p>Published works are subject to copyright protection if:</p> <p>(1) on the date of the first publication, one or more of the authors is a national or domiciliary of the United States, or is a national or domiciliary, or sovereign authority of a foreign nation that is party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciliated,</p> <p>(2) the work is first published in the United States or in a foreign nation that on the date of first publication, is a party to the Universal Copyright Convention or the Berne Convention,</p> <p>(3) the work is first published by the United Nations or any of its specialised agencies, or by the Organisation of American States.</p> <p>The President may, at his discretion, afford protection to a specific country on the basis of reciprocity (section 104(b)).</p>	<p>Copyright will subsist in a published work if the author was, at the date of the making of the work, a citizen or subject of, or a person resident in, a treaty country (section 5(1)(a)).</p> <p>It will also subsist in a work if its first publication, is in such a quantity as to satisfy the reasonable demands of the public having regard to the nature of the work, occurred in a treaty country (section 5(1)(c)(i)).</p> <p>The Minister, may at his discretion, afford protection to a specific country on the basis of reciprocity (section 5(2)).</p>

Comments :

- Works first published in a WTO country will be protected in Canada but not necessarily in the US.
- Unlike the US, Canada does not seem to provide protection specifically to works of the UN organisation. However these works will be protected if the author is a citizen or resident of a treaty country or if they are first published in a treaty country.

2 WHO CAN CLAIM COPYRIGHT

TABLE 2.1 FIRST OWNER

US Copyright Act (sections 101,201, 202)	Canadian Copyright Act (section 13)
The author is the first copyright owner (section 201(a)).	The author is the first copyright owner
<p><u>Comments:</u> Although the term "author" is not defined in either Act, it refers in principle to the person who created the work, who expressed an idea in any original material form.</p> <p>In Canada, a corporation may in certain specific instances be considered the author of a work as it concerns photographs (see sections10).</p>	
<p>In the case of a "work made for hire" the employer not the employee is <i>considered to be the author</i> (section 201(b)).</p> <p>A "work made for hire" means :</p> <p>(1) a work prepared by an employee within the scope of his or her employment; or</p> <p>(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as s supplementary work, as a compilation, as an instructional text, as answer material for a test, or as an atlas, <i>if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.</i></p>	<p>In the case of a work made by an employee, under a contract of services or apprenticeship, in the course of his employment, <i>the first owner</i> of copyright is the employer and not the employee. Where the work is a contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical (section 13(3)).</p>

<p>(section 101)</p> <p>In the US, in the case of a work made for hire (section 201(b)), the author is considered to be the employer not the employee.</p>	
	<p>Where in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person for valuable consideration, and the consideration was paid, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright (section 13(2)).</p>
<p>Copyright protection is not available for works of the US Government. (section 105).</p>	<p>Where a work has been prepared or published by or under the direction of the government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty (section 12).</p>
<p>Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright (section 202).</p>	<p>Although, this principle is not expressed in the Act, the Canadian copyright law distinguishes the work from the material object in which it is embodied. Therefore ownership of the material object does not necessarily imply ownership of copyright.</p>

TABLE 2.2 JOINT WORKS

US Copyright Act (sections 101, 201)	Canadian Copyright Act (section 2)
The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary (section 201(a)).	The authors of a work of joint authorship are co-owners of the copyright in the work, unless there is an agreement to the contrary.
<p>A "joint works" means a work prepared by two or more authors with the intention that their contributions be a merged into inseparable or interdependent parts of a unitary whole (section 101).</p> <p>a "collective work" is a work, such as a periodical issue, anthology, or encyclopaedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work (section 101).</p> <p>And a "compilation" is a work formed by the collection and assembling of pre-existing material or of data that are selected, co-ordinated, or arranged in such way that the resulting work as a whole constitutes an original work of authorship. The term compilation include the collective work (section 101).</p>	<p>A "work of joint authorship" means: a work produced by the collaboration of two or more authors in which the contribution of one is not distinct from the contribution of the other author or authors .</p> <p>"collective works" means :</p> <p>(a) an encyclopaedia, dictionary, yearbook or similar work;</p> <p>(b) a newspaper, review, magazine or similar periodical; and</p> <p>(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.</p> <p>And "compilations" means :</p> <p>(a) work resulting from the selection or arrangement of literary, dramatic, musical, or artistic work thereof; or</p> <p>(b) a work resulting from the selection or arrangement of data.</p>

Comments

In both statutes these notions are similar, however, they are not afforded the same treatment. In Canadian as well as in American Law, the authors of a work of joint authorship are co-authors of that work and co-owners of the copyright attached thereto, since the contribution of one author can not be parted form that of another.

The situation is different with respect to collective works. In the US the notion of collective work comprise compilations and the owner of copyright in the collective works is the person who has gathered together the different contributions (section 201 (c)). Copyright in each separate contribution to a periodical or other collective work is, however, distinct from the copyright in the collective work as a whole and vests initially with the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

In Canada the notions of collective work and compilations are independent. The author of a compilation is the person who selected and arranged its components , but there is no such specification for a collective work. The author of a contribution to the collective work remains the owner of the copyright attached thereto, unless it is made by an employee in the course of its employment, and unless there is an assignment of copyright.

TABLE 2.3 TRANSFER OF COPYRIGHT

US Copyright Law (sections 115,201(d),203,204)	Canadian Copyright Law (section 13(4))
Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred by any means of conveyance (section 201(d)).	The owner of the copyright in a work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence.
The transfer of copyright ownership is not valid unless that transfer is in writing and signed by the owner of the rights conveyed, or its duly authorised agent (section 204(a)).	The licence may be exclusive or non exclusive.
	No assignment or grant is valid

	unless it is in writing, signed by the owner of the right in respect of which the assignment or grant is made, or by its duly authorised agent.
In the case of nondramatic musical works, the exclusive rights to produce and distribute to the public copies or phonorecords of the copyrighted work , are subject to compulsory licensing under the conditions specified by section 115 of the Act.	Bill C-32 has eliminated the compulsory licensing scheme.
<p>A copyright may also be bequeathed by will or pass as personal property by the applicable laws if intestate succession (section 201(d) (1)).</p> <p>The present law permits termination of a grant of rights after 35 years of the death of the author, under certain conditions and by serving written notice on the transferee within specified time limits (section 203).</p>	<p>Same thing for Canada.</p> <p>When the author is the first owner of copyright, no assignment of copyright and no grant of any interest therein, made by him otherwise than by will, after June 4, 1921, is operative beyond the expiration of 25 years from the death of the author. After that period the right returns to the legal representatives of the author, as part of its estate. Any agreement entered into by the author as to the disposition of such reversionary interest is void. (section 14(1)).</p>

3 DURATION OF COPYRIGHT

US Copyright Law (sections 302,303,304)	Canadian Copyright Law (sections 6,7,9,10,11.1,12)
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<p>1. Works originally created (fixed in tangible form) on or after January 1, 1978 :</p> <p>Automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus 50 years after his death (section 302(a)).</p> <p>In the case of a joint work prepared by two or more authors who did not "work for hire", the term lasts for 50 years after the last surviving author's death (section 302(b)).</p> <p>For works made for hire, anonymous or pseudonymous works, copyright will subsist during 75 years after first publication or 100 years from creation, whichever ever is shorter (section 302 (c)).</p>	<p>General principle :</p> <p>Copyright shall subsist during the life of the author, the remainder of the calendar year in which the author dies, and 50 years following the end of that calendar year (section 6).</p> <p>In the case of a work of joint authorship, copyright shall subsist during the life of the author who died last, for the remaining of the calendar year in which that author dies, and 50 years following the end of that calendar year (section 9(1)).</p> <p>Exceptions :</p> <p>Photographs: if the owner of a photograph is a corporation, the term is the remainder of the year of the making of the initial negative plus 50 years (section 10).</p> <p>Anonymous and pseudonymous works: copyright shall subsist for the earliest of the following terms:</p> <p>(a) the remainder of the calendar year of the first publication of the work and 50 years following the end of that year,</p> <p>(b) the remainder of the calendar year of the making of the work and 75 years following the end of that year (section 6.1).</p>
<p>2. Works originally created (fixed in tangible form) before January 1, 1978, but not published or registered by that</p>	<p>Posthumous works: is a work in which copyright still subsists at the date of the death of the author, has not been published</p>

<p>date:</p> <p>The duration of copyright in these works will generally be computed in the same way as for works created on or after January 1, 1978.</p> <p>However in no case, will the term of copyright for works in this categories expire before December 31, 2002, and for a work published on or before December 31, 2002, the term will not expire before December 31 2027 (section 303).</p>	<p>or performed in public, in such cases copyright shall subsist until publication or performance, as the case may be, plus 50 years following the end of that calendar year (section 7)</p> <p>Cinematographic works: cinematographic works are dramatic works and are protected as such. However a cinematographic work in which the arrangement or acting form or the combination of incidents represented do not give the work a dramatic character, is only protected for 50 years following the end of the calendar year of the work's first publication. If the work is not published before the expiration of 50 years following the end of the calendar year of its making, the work will be protected for 50 years following the end of that calendar year (section 11.1).</p> <p>Works of the Crown : copyright will subsist for 50 years following the end of the calendar year of its publication (section 12).</p>
<p>3. Works originally created (fixed in tangible form) and published or registered before January 1, 1978 :</p> <p>These works were protected for a first term of 28 years. During the last year of the first term, the copyright as eligible for a renewal term of 28 years. This term was extended to 47 years by the current law. Therefore, in</p>	

<p>general these works are eligible for a total term of protection of 75 years from their publication or registration, if the work was registered in unpublished form (section 304).</p>	
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4 WHAT COPYRIGHT IS

TABLE 4. 1 PROTECTED RIGHTS

US Copyright Law (sections 101,106,109)	Canadian Copyright Law (sections 2,3)
The author <i>has</i> the <i>exclusive right to do and authorise</i> any of the following :	Copyright <i>includes</i> the <i>exclusive right to do and authorise</i> any of the following:
<i>reproduction right</i>	<i>reproduction right</i>
- To <i>reproduce</i> the copyrighted work in copies or phonorecords (section 106(1)).	- To <i>produce or reproduce</i> the work or any substantial part thereof in any material form whatever.

Comments :

The reproduction right has the same application in Canada and in US.

"**Copies**" are defined in the US Copyright Act as "material objects other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term copies includes the material object, other than a phonorecord, in which the work is first fixed."

In Canada although the term "copy" is not defined, it is intended to have the same meaning.

"**Phonorecords**" are defined in the US Copyright Act as "material objects in which sounds, other than those accompanying a motion picture or other audio-visual work, are fixed by any method now known or later developed, and from which the sounds can be

perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

In Canada an "**audio recording medium**" is almost similar : "recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium".

<i>adaptation right</i>	<i>adaptation right</i>
<p>- To prepare derivative works based upon the copyrighted work (section 106(2)).</p>	<p>- To produce, reproduce, perform or publish any translation of the work;</p> <p>- To convert a dramatic work into a non-dramatic work;</p> <p>- To convert a non dramatic work into a dramatic work, by way of performance to the public or otherwise;</p> <p>- In the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed;</p> <p>- To reproduce, adapt, and publicly present any work as a cinematographic work.</p>

Comments : The US protection for derivative works seems to be wider than the one afforded in Canada. Before the last modification to the Canadian Copyright Act, the adaptation right was limited to the actions specified in section 3. However the use of the word "including" in the new section 3 instead of "means" (old section 3) seems to imply that from now on other forms of adaptation may be covered by the exclusive right.

Distribution right

distribution right

<p>To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending (section 106(3)).</p> <p>Nevertheless, the owner of a particular copy or phonorecord lawfully made, or any person authorised by him, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord (section 109 (a)).</p>	
<i>rental right</i>	<i>rental right</i>
<p>Has the right to distribute copies or phonorecords of the copyrighted work to the public by rental (section 106(3)).</p> <p>Unless authorised by the owners of the copyright, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program, may, for the purpose of direct or indirect commercial advantage, dispose or authorise the disposal of the possession of that phonorecord or computer program by rental, lease, or lending, or by any other act or practice in the nature of rental, lease or lending (section 109 (A)).</p> <p>Section 109(A)) does not apply to 1) a computer program which embodied in a machine or product and which cannot be</p>	<p>- To rent out a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer.</p> <p>- In the case of a musical work, to rent out a sound recording in which the work is embodied.</p> <p>An arrangement, whatever its form, constitutes a rental of a computer program or sound recording if, and only if:</p> <p>(a) it is in substance a rental, having regard to the circumstances; and</p> <p>(b) it is entered into with the motive of gain in relation to the overall operations of the person who rents out the computer program or sound recording as the case may be.</p>

copied during the ordinary operation or use of the machine or product; or ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes (section 109(B)).

Comments :

1. Distribution right :

The American distribution right is equivalent to the Canadian publication right. The main difference is that in the US publication occurs only when the possession of works is transferred to the public. This obligation does not seem to exist in Canada where making copies available to the public is sufficient (see comment on publication).

2. Rental right :

The rental right was introduced in Canada by the NAFTA agreement. NAFTA sets forth the basic characteristics of this right. It is therefore normal that Canada and the US have similar provisions on this subject.

3. Lending right :

There is no lending right in Canada.

<i>public performance right</i>	<i>public performance right</i>
<ul style="list-style-type: none"> - To perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works (section 106(4)); - In the case of sound recordings, to perform the work publicly by means of a digital audio transmission (section 106(6)). 	<ul style="list-style-type: none"> - To perform the work in public.
<ul style="list-style-type: none"> - To display the copyrighted work publicly, in the case of literary, musical, and 	<ul style="list-style-type: none"> - To present at a public exhibition, for a purpose other than sale or hire, an artistic work

choreographic works, pantomimes and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work (section 106(5));	created after June 7, 1988, other than a map, chart or plan.
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Comments :

In Canada: "**performance**" means "any acoustic or visual representation of a work, performer's performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or a television receiving set."

And "**performer's performance**" means any of the following when done by a performer:

- (a) performance of an artistic, dramatic and musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired;
- (b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired;
- (c) an improvisation of a dramatic work, whether or not the improvised work is based on a pre-existing work (section 2).

In the US: "**to perform**" a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audio-visual work, to show its images in any sequence or to make the sounds accompanying it audible (section 101). And, "**to display**" a work means "to show a copy of it, either directly or by means of a film, slide, television image, or any other or process, or in the case of a motion picture or other audio-visual work, to show individual images nonsequentially".

The right to communicate the work to the public by telecommunication could have been included in the public performance right. However, the interpretation given in Canada to the words "in public" was not wide enough to include the normal circle of a family, or persons sharing the same abode, the same housing complex or the same hotel room, for instance. Therefore, communications made to those persons in particular were private communications. Accordingly, radiocommunications or telecommunications are not communications made to the public but

a series of private communications not covered by copyright. To avoid this situation, a specific right, the right to communicate the work to the public by telecommunication, was granted.

According to the US Copyright Act, **to perform or display a work "publicly"** (or public performance right) means :

(1) to perform or display it at a place open to the public or at the any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different time (section 101)

To **"transmit"** a performance or a display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

Therefore in the US the right to perform or display a work includes what we call in Canada the right to communicate the work to the public by telecommunications.

TABLE 4.2 COPYRIGHT INFRINGEMENT

US Copyright Law (section 501)	Canadian Copyright Law (sections 3(1),27)
<p>"To prevail in an infringement action the plaintiff need to prove only two elements: plaintiff's ownership of the copyright, and defendant's copying of constituent elements of the work that are original. The former element requires proof of originality in the author, copyrightability of subject matter, proper citizenship status of the author, compliance with applicable formalities and, if the</p>	<p>Copyright gives the exclusive right to do certain things including reproducing the work in any material form. There is a reproduction of the work when the work is reproduced in full or when a substantial part of it is taken. Reproduction means copying and the question whether there has been copying of a substantial part of a work depends more on the quality than on the quantity of what</p>

plaintiff is other than the author, proper chain of title from the author. A filed registration certificate creates a presumption in the plaintiff's favour with respect to each of those factors except chain of titles. Therefore, the first element is effectively proved by tendering a registration certificate and, for a non-author plaintiff, proof of transfer from the author. *Prima facie* proof of the first element being typically straight forward, this leaves the plaintiff with the burden of proving copying by the defendant.. (P. Geller, M. Nimmer, *International copyright law and practice*, New York, vol. 1-2, Matthew Bender, 1997 at 8(1)(a)(i).)

was taken.

Section 27 (1) says that it is an infringement for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner has the right to do. This Section creates direct or primary infringement. It must always be read in conjunction with Section 3 which sets out what only the owner of copyright has the right to do.

Section 27(2) establishes that it is an infringement to a) sell or rent out ; b) distribute to such an extent as to affect prejudicially the owner of the copyright; c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public; d) possess for the purposes of doing anything referred to in paragraphs a) to c); or e) import into Canada for the purpose of doing anything referred to in paragraphs a) to c), a copy of a work, sound recordings or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it. This provision relates to what is called indirect infringement or secondary infringement.

Substantial similarity analysis.	Section 27 creates two kinds of infringement. Direct or primary infringement on the one hand and indirect or secondary infringement on the other. Primary infringement is carried out by the person that actually copies the work. For there to be a finding of direct infringement, the copyright owner must prove that the infringer had access to the work and that there was copying. Section 27(2) deals with secondary infringement which occurs when a person other than the person who actually made the illegal copies, carries out certain dealings with respect to infringing works. A distinguishing feature between the two types of infringement is the requirement of knowledge on the part of the infringer in the case of secondary infringement.
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TABLE 4.3 REMEDIES

US Copyright Law (sections 411,502,503,504,505,506,509)	Canadian Copyright Law (sections 35,38, 39, 42,43,44.1,44.2)
The remedies are: actual damages and profits (s. 504 b), statutory damages (s. 504 c), costs and attorney's fees (s. 505), injunctions (s. 502), impoundment (s. 503 a), destruction of the copies (s. 503 b) and criminal offences (s. 506). Section 509 establishes a seizure	The remedies are damages (s. 35(1)), accounts of profits (s. 35(1)), exemplary or punitive damages (s. 38(7)), Anton pillar Orders (s. 470 <i>Federal Court Rules</i>), seizure before judgement (s. 38(1)(2)), destruction of the copies (s. 38(2)), injunctions, (s. 39), criminal offences (s. 42 & 43), any order considered

<p>and forfeiture right.</p> <p>Actual damages must be proven.</p>	<p>appropriate (s. 44.1, 44.2). In the Province of Quebec, a seizure of the offending goods may be made before judgement in respect of infringing copies. In effect, the Plaintiff seizes property he alleges he owns since the Copyright Acts creates a presumption to the effect that the owner of copyright is the owner of infringing copies.</p>
<p>The plaintiff can sue for statutory damages (s. 504 b). Under the U.S. statutory damages election, the plaintiff is spared the expense of proving damages and profits up to a maximum of 20 000. That remedy is available when the injured party cannot prove damages and defendant's profits. It is an absolute right. It is also an alternative remedy .</p>	<p>It is not necessary to prove "actual" or "specific" damages because damages are at large. However, the plaintiff is required to prove damages derived from the infringement. An account of profits follows a different procedure and is discretionary in nature. Once the Plaintiff proves Defendant's gross sales of the infringing articles, Defendant is required to prove every element of cost claimed by him in reduction of his liability.</p>
<p>In some cases , the work must be registered before instituting proceedings (section 411) (see the table on registration).</p>	<p>The work doesn't have to be registered.</p>

TABLE 4.4 MORAL RIGHTS

US Copyright Law (section 106 A)	Canadian Copyright Law (sections. 14.1, 14.2, 28)
<p>In the US only authors of a work of visual art are entitled to moral rights.</p> <p>The author of a work of visual art</p>	<p>The author of a work has the right to be associated with the work as its author, by name or under a pseudonym or the right to remain anonymous.</p>

has the right:

(1) to claim authorship of that work and to prevent the use of his name as the author of any work of visual art which he did not create;

(2) prevent the use of his name as the author of the work in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honour or reputation;

(3) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his honour or reputation; and

(4) to prevent any destruction of a work of recognised stature.

He also has the right to the integrity of his work. This right is violated if the work is, to the prejudice to the honour or reputation of the author destroyed, mutilated or otherwise modified, or used in association with a product, service cause or institution (section 14.1).

Moral rights in respect of a work subsists for the same term as the copyright in the work (section 14.2).

COMMENTS

In the US, the moral rights protection offered is very limited because it only applies to visual art. Those rights can be waived if the author expressly agrees to such waiver in a written instrument signed by him (section 106A(e)). Nevertheless, ownership of the moral rights cannot be transferred.

In Canada, all works are protected under the moral rights doctrine. The author may waive his moral right in whole or in part. For instance, an author may accept not to assert paternity in a work but refuse to abandon his integrity right. There is no particular requirement with respect to the form in which a waiver can be made. Furthermore, a waiver can be express or implied. Moral rights cannot, under any circumstances, be assigned. They are transferred at death to the heirs or legatees of the author. Finally, where the author of a work and the owner of the work are not one and the same person, the author

always retains moral rights in the work.

TABLE 5 LIMITATIONS OF COPYRIGHT

US Copyright Law (section 107)	Canadian Copyright Law (sections 29 to 29.2)
<i>fair use</i>	<i>fair dealing</i>
"fair use" for purposes <i>such as</i> criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.	"fair dealing" - for purpose of research or private study does not infringe copyright
<p>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:</p> <p>(1) the purpose and character of the use, including whether such use is of commercial nature or is for non profit educational purposes;</p> <p>(2) the nature of the copyrighted work;</p> <p>(3) the amount and subsidiary of the portion used in relation to the copyrighted work as a whole; and</p> <p>(4) the effect of the use upon the potential market for or value of the copyrighted work.</p> <p>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</p>	<p>- for the purpose of criticism, review or news reporting does not infringe copyright if the following are mentioned:</p> <p>(a) the source; and</p> <p>(b) if given in the source, the name of the author.</p>

Comments :

1. Definition of fair dealing

In Canada, as in the US, the main and most known exception to

copyright infringement is "fair dealing" or "fair use".

There is not in the Canadian Copyright Act a general exception of fair dealing. Sections 29 to 29.2 provide for a fair dealing exception, but limit it to particular purposes. Therefore the Canadian exception is far from being as wide as the American fair use. In *Campbell v. Actuff-Rose*, the Supreme Court of the United States ruled that a parody may constitute fair use of copyrighted work. In Canada such interpretation could hardly be given. Sections 29 to 29.2 are clear, fair dealing is accepted as a defence to copyright infringement only for the purposes of research, or private study, and, on certain conditions, for criticism, review or news reporting. Parody is not covered by the exception.

Moreover the Canadian Copyright Act does not give the criteria to consider in determining whether a particular use of a work is a fair dealing of that work. It is left to Courts to decide. In *Hubbard v. Vosper* (1972) 2 W.L.R. 383, p. 393, the Court underlines the difficulty of defining and determining what fair dealing is:

"It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comments, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next you must consider the same information as the author, for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But , short extracts and long comments may be fair. Other considerations may come to mind also. But after all is said and done, it must be a matter of impressions...".

It should however be noted, that fair dealing is a defence to copyright infringement. Therefore, it implies substantial taking of someone else's work.

2. Fair dealing and unpublished works

Section 107 of the US copyright Act provides that the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all other factors. In Canada there is no such specification but nothing in the in the wording of sections 29 to 29.2 allows to exclude unpublished works from the application of the

fair dealing exception. However, Courts have generally refused to apply it to criticism, review or news reporting. In doing so Courts intend to avoid that certain parts of the work are disclosed before the disclosure of the work itself. This does not apply to unpublished musical, or dramatic or literary works that have been largely diffused.

3. Citation right

The citation right provided by the Berne Convention is comprised in the Canadian fair dealing exception and is granted to authors but also to phonorecord producers and broadcasters, as the only form of moral right granted to them.

The American fair use doctrine does not seem to include a citation right.

<i>Copyright for private use Audio Home Recording Act</i>	<i>copying for private use (section 80 and following)</i>
<p>On 7 October 1992, the <i>Audio Home Recording Act</i> was adopted in the US, on the initiative of the Recording Industry Association of America (RIAA), the Electronic Industries Association (EIA) and the National Music Publishers Association (NMPA). This Act introduced private copying legislation in the US and combines a royalty payment system together with the obligation to incorporate a technical control mechanism to prevent unauthorised serial copying of copyrighted works in digital audio recordings and interface data. However the act only applies to digital technology, leaving aside analogue audio recorders and analogue recording media (cassettes and discs).</p> <p>Any digital audio recording device or audio interface device manufactured, imported</p>	<p>Since the coming in force of Bill C-32, it is no longer an infringement to reproduce all or any substantial part of :</p> <p>(a) a musical work embodied in a sound recording; or (b) a performer's performance of a musical work embodied in a sound recording; or (c) a sound recording in which a musical work, or a performer's performance of a musical work is embodied onto an audio recording medium for the private use of a person who makes the copy.</p> <p>An "audio recording medium" is a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium.</p> <p>This exception is however limited</p>

<p>or distributed on the US market must be fitted with a device controlling copying known as the "Serial Copy Management System" (SCMS). This system does not prevent copying. It allows individuals to make copies directly from the original digital audio recordings they have purchased but no further copies can then be made from those copies, thus preventing what is called "serial copying".</p>	<p>to sound recordings and a levy on blank audio recording media was established for compensation purposes. Section 82 provides that every person who, for the purposes of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada is liable to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada.</p>
<p><i>Educational Institutions</i> (sections 110(1),(2),(4))</p>	<p><i>educational Institutions or persons acting under its authority</i> (sections 29.4 to 30)</p>
<p>The following are not infringements of copyright:</p> <ul style="list-style-type: none"> - the performance or display of a work by the instructors or pupils in the course of face to face etching activities of a non profit educational institution, in a classroom or similar places devoted to instruction (section 110(1)). - the performance of a non-dramatic literary or musical work or display of a work, by or in the course of a transmission if: <ul style="list-style-type: none"> (a) the performance or display is a regular part of the systematic instructional activities of a government body or a non-profit educational institution; and (b) the performance or display is directly related and of material assistance to the teaching content of the 	<p>For an educational institution or a person acting under its authority it is not an infringement of copyright to do the following if it is done on the premises of an educational institution, for the purposes of education or training, and not for profit :</p> <ul style="list-style-type: none"> - make a manual reproduction onto a surface intended for displaying hand-written material; - make a copy of the work to be used to project an image of that copy using an overhead projector or similar device; - reproduce, translate or perform in public; - communicate by telecommunication to the public situated on the premises of the educational institution;

<p>transmission; and</p> <p>(c) the transmission is made primary for:</p> <p>i) reception in classrooms or similar places normally devoted to instruction; or</p> <p>(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction; or</p> <p>(iii) reception by officers or employees of government bodies as a part of their official duties or employment (section 110 (2);</p> <p>the performance of a non-dramatic literary or musical work otherwise than in a transmission to the public, does not infringe copyright if done without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organisers, if the proceeds are used exclusively for educational, religious, or charitable purposes and not for private financial gain (section 110 (3)(4)).</p> <p>(Under certain conditions the copyright owner may object to such performance.)</p>	<p>- make at the time of its communication to the public by telecommunication, a single copy of a news program, excluding documentaries and perform it in public before the students of the institution.</p>
	<p>Is not an infringement of copyright:</p>

	<p>- the live performance in public, primarily by students of the educational institution, of a work;</p> <p>- the performance in public of a sound recording or of a work that is embodied in a sound recording; and</p> <p>- the performance in public of a work at the time of its communication to the public by telecommunication</p> <p>if it is done before an audience consisting primarily of students of the educational institution, and any person directly responsible for setting a curriculum for the educational institution;</p>
	<p>The publication in a collection, mainly composed of non-copyright matter, intended for the use of educational institutions, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works in which copyright subsists and not themselves published for the use of educational institutions, does not infringe copyright in those published literary works if</p> <p>(a) not more than two passages from works by the same author are published by the same publisher within five years</p> <p>(b) the source from which the passages are taken is acknowledged; and</p> <p>(c) the name of the author, if given in the source, is</p>

	mentioned.
<p><i>Comments</i> : In The US Copyright Act the "educational institutions" exception is provided by section 110 but is also comprised in the fair use exception. Fair use for purpose of teaching (including multiple copies for classroom use) is not infringement of copyright. Since the American exception of fair use for purposes of teaching is general, it could in many respects be wider than the Canadian exception provided for educational institutions</p>	
<p><i>reproduction by Libraries and Archives (section 108)</i></p>	<p><i>Library, Archives and Museums or any person acting under their authority (sections 30.1 to 30.5)</i></p>
<p>Has the right to make the reproduction of one single copy , in a facsimile form of :</p> <ul style="list-style-type: none"> - a published work solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen and if an unused replacement cannot be obtained at fair price; - an unpublished work for purposes of preservation and security or for deposit for research use in another Library or archives if the copy or phonorecord is currently in the collections of the Library or archives; - a copy of (i) no more than one article or other contribution to a copyrighted collection or periodical issue, (ii) of a small part of any other copyrighted work or (iii) of a substantial part of it if a copy of that work or phonorecord cannot be obtained at a fair price and if the copy becomes the property of the user for private use, 	<p>It is not an infringement of copyright to make a copy of a work:</p> <ul style="list-style-type: none"> - if the original is rare or unpublished and is deteriorating, damaged or lost or is at risk of deterioration, or becoming damaged or lost; - for the purpose of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept; - for the purposes of internal record-keeping and cataloguing; - for insurance purposes or police investigations; - for restoration; - in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable.

<p>scholarship, or research on the condition that : (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;</p> <p>(2) the collections of the Library are open to the public or to all persons doing research in a specialised field.; and (3) the reproduction or distribution of the work includes a notice of copyright.</p>	
<p><i>Computer programs (section 117)</i></p>	<p><i>computer programs (section 30.6)</i></p>
<p>In is not an infringement for the owner of a copy of a computer program to make or authorise the making of another copy or adaptation of that computer program provided:</p> <p>(1) that such a new copy or adaptation is created as an essential step in the utilisation of the computer program in conjunction with a machine and that it is used in no other manner; or</p> <p>(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful;</p> <p>Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only</p>	<p>It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorised by the owner of the copyright to</p> <p>(a) make a single reproduction of the copy by adapting, modifying or converting the computer program or translating it into another computer language if the person proves that the reproduced copy is</p> <p>(i) essential for the compatibility of the computer program with a particular computer,</p> <p>(ii) solely for the person's own use, and</p> <p>(iii) destroyed immediately after the person ceases to be the owner of the copy; or</p> <p>(b) make a single reproduction for backup purposes of the copy or of the reproduced copy referred to in paragraph (a) if the person proves that the reproduction for backup purposes is destroyed</p>

<p>as part of the lease, sale, or other transfer of all rights in the program. Adaptation so prepared may be transferred only with the authorisation of the copyright owner.</p>	<p>immediately when the person ceases to be the owner of the copy of the computer program.</p>
<p><i>Incidental Inclusion</i></p>	<p><i>incidental Inclusion (section 30.7)</i></p>
	<p>It is not an infringement of copyright to incidentally and not deliberately</p> <p>(a) include a work or other subject-matter in another work or other subject matter; or</p> <p>(b) do any act in relation to a work or other subject matter that is incidentally and not deliberately included in another work or other subject-matter.</p>
<p><i>Ephemeral recordings (section 112)</i></p>	<p><i>ephemeral recordings (sections 30.8 and 30.9)</i></p>
<p>This exception exists in the US Copyright Act and is quite similar to the Canadian one.</p>	<p>It is not an infringement of copyright for a programming undertaking to fix or reproduce in accordance with this section a performer's performance or work, other than a cinematographic work, that is performed live, or a sound recording that is performed at the same time as the performer's performance or work, if the undertaking</p> <p>(a) is authorised to communicate the performer's performance, work or sound recording to the public by telecommunications;</p> <p>(b) makes the fixation or</p>

	<p>reproduction itself, for its own broadcasts;</p> <p>(c) does not synchronise the fixation or reproduction with all or parts of another recording, performer's performance or work; and</p> <p>(d) does not cause the fixation or reproduction to be used in advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.</p>
<p><i>persons with perceptual disabilities</i> (sections 110 (8)(9) and 121)</p>	<p><i>Persons with perceptual disabilities</i> (sections 2 and 32)</p>
<p>It is not infringement of copyright for an authorised entity to reproduce or to distribute copies or phonorecords of a previously published non-dramatic literary work if such copies or phonorecords are reproduced or distributed in specialised formats exclusively for use by blind or other persons with disabilities.</p>	<p>It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organisation acting for his or her benefit, to</p> <p>(a) make a copy or sound recording of a work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;</p> <p>(b) translate, adapt, or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or</p> <p>(c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.</p>

Is not a copyright infringement, the performance of a non-dramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a government body; or (ii) a non-commercial educational broadcast station; or (iii) a radio subcarrier authorisation; (iv) a cable system.

Is not a copyright infringement, the performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct commercial advantage and its transmission is made through the facilities of a radio subcarrier authorisation referred to in clause (8) (iii) Provided, that the provisions of this clause shall not

This exception does not authorise the making of a large print book, and does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs to a person with a perceptual disability.

"perceptual disability" means a disability that prevents or inhibits a person from reading or hearing a work in its original format, and includes such a disability resulting from

- (a) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,
- (b) the inability to hold or manipulate a book, or
- (c) an impairment relating to comprehension;

"commercially available" means, in relation to a work or other subject-matter,

- (a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
- (b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable efforts;

<p>be applicable to more than one performance of the same work by the same performers or under the auspices of the same organisation.</p>	
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<p><u>Comments</u> : Both acts provide exceptions for persons with perceptual disabilities. However the protection given by Canada seems to be wider since it covers all works other than cinematographic works. The US Act limits its exception to non-dramatic literary works (works, other than audio-visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the material objects in which they are embodied).</p>	
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<p><i>Other exceptions (section 117)</i></p>	<p><i>Other exceptions</i></p>
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<p>When there is no direct or indirect admission charge, the performance of a non-dramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organisers.</p>	
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<p>Performance of a non-dramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.</p>	
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Performance of a non-dramatic literary or musical work or of a non dramatic-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.	Equivalent (section 32.2(3))
Performance of a non-dramatic musical works by a governmental body or non profit agricultural or horticultural organisation, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organisation.	equivalent (section 32.2(2))
Performance of non-dramatic literary or musical work in the course of a social function which is organised and promoted by non-profit veterans' organisations or non-profit fraternal organisation to which the general public is not invited.	equivalent (section 3.2 (3))

CONCLUSION: “NEIGHBOURING RIGHTS”

As seen above, there are still several notable differences between American and Canadian law. To name a few: moral rights, fair use/ fair dealing distinction, the impact of registration on a lawsuit, the protection of useful articles, and the duration of copyright. We also wish to briefly discuss the issue of “neighbouring” rights which has been included in a rather novel way in the *Canadian Copyright Act*.

On June 4th, 1998, Canada adhered to *the Rome Convention of 1961 for the protection of performers and producers of phonograms*. In order to become a member, Canada had to modify its *Copyright Act* to recognise what is commonly known as “neighbouring” rights for performers and phonogram producers. It has also provided for broadcasters rights. However, as we have seen, the Canadian legislator has chosen not to grant those rights as neighbouring rights, but rather as author’s rights or copyright in an “object”, which is, as the case may be, a performance, sound recording or

communication signal. The performers, sound record makers, and broadcasters are the authors of such objects of copyright but they are only entitled to economic protection of their products and no moral rights are attached thereto. Therefore, the rights granted to performers, sound record, makers or broadcasters are rather exceptional in nature.

A performer has a copyright in the performer's performance. The performance or a substantial part thereof is protected in several ways depending on whether the performance is fixed or not. If the performance is not fixed then the rights consist of the sole right to (1) communicate to the public by telecommunication, (2) to perform in public, where it is communicated to the public by telecommunication otherwise than by a communication signal, and (3) to fix it in any material form. In the event the performance is fixed then the sole right includes (1) the right to reproduce any fixation that was made without authorisation; (2) where the performer authorised the fixation he also has the exclusive right to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorisation was given and (3) where fixation was permitted then the performer also has the sole right to reproduce any reproduction of that fixation, if the production being reproduced was made for a purpose other than one permitted. In all cases, the performer also has the exclusive right to rent out a sound recording of the performance and to authorise any of the foregoing acts (Section 17).

The *Copyright Act* sets out a series of conditions for the subsistence of the sole rights set out above.

The maker (or producer) of a sound recording has the sole right to publish it for the first time, to reproduce it in any material form, to rent it out and to authorise any such acts (Section 18).

Both performer and sound recording maker are entitled to be paid equitable remuneration for its performance in public or its telecommunication to the public by telecommunication (not by retransmission).

The broadcaster has the sole right to fix its communication signal, to reproduce any unauthorised fixation of it, to authorise another broadcaster to retransmit to the public simultaneously with its broadcast and in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee. He has also the sole right to authorise any such acts (Section 21).

In terminating, we note that that Canada and the US are both members of the *Berne Convention*, although the US does not consider itself bound by article 6 *bis* on moral rights. The US has not adhered to the *Rome Convention*.

ROBIC + LAW
+ BUSINESS
+ SCIENCE
+ ART

ROBIC + DROIT
+ AFFAIRES
+ SCIENCES
+ ARTS

