

The effects of the COVID-19 pandemic and social distancing measures hit Canada's arts communities early, hard and fast. Even when present measures ease up, the return of performing artists to the stage looks to be a slow one.

Some creators may use this time in isolation to craft new works, while others may find it impossible to do so while trying to make ends meet and take care of their health and loved ones. Others are finding different approaches to making a living with their talents, such as creating original online content and live streaming performances on social media. With all norms interrupted and innovations sure to emerge, now is as good a time as ever to hone up on the protection copyright laws provide to creators.

## WHAT IS COPYRIGHT?

Copyright is entirely a statutory right, granted by the *Copyright Act* of Canada (the "Act") (found here <https://laws-lois.justice.gc.ca/eng/acts/C-42/Index.html>). This means that copyright protection is limited to what is specifically provided for by the Act.

At its essence, copyright provides economic rights which prevent the unauthorized use or reproduction of original literary (including computer programs), artistic, dramatic or musical works. Copyright also provides a separate form of protection, colloquially known as neighbouring rights, to:

- the maker of any sound recording (i.e. record label);
- any performer whose performance of an artistic, dramatic or musical work is captured in that sound recording; and
- the broadcaster in its signal (i.e. radio waves).

Here's the thing: copyright is not just one thing — it is bundles of rights, not necessarily held by one person. There are different sets of rights for different things, which may be owned by different parties. For example, A might write a song that B performs on a sound recording made by C, which D then broadcasts. All of A, B, C and D have different rights, which may be retained by them, or sold or granted to others.

## ECONOMIC RIGHTS

The basic economic right provided by the Act is the exclusive right to:

- produce or reproduce a work, or a substantial part of it, in any material form;
- perform the work, or a substantial part of it, in public; and,
- publish the work, or any substantial part of it.

This economic right includes, for example, the exclusive right to:

- convert a dramatic work to another form, such as a novel, or vice versa;
- make a sound recording or film of a literary, dramatic or musical work;
- communicate the work to the public;
- exhibit the work;
- translate the work;
- sell a tangible work; and
- authorize someone to do any of the above.

## NEIGHBOURING RIGHTS

Neighbouring rights provide performers certain exclusive rights, including the right to “fix” a live performance (i.e. record it) or have the performance broadcast, streamed, etc., or authorize others to do so. If the performance is already recorded, the performer has the exclusive right to reproduce that recording, make it available to the public, sell the recordings or authorize others to do such things.

The maker of the sound recording (i.e. record label) also has certain exclusive rights, including the right to publish the recording for the first time, reproduce it in any material form, rent it out, make it available to the public (i.e. streaming, etc.) and sell it in any material form.

At the end of the day, authorizing others to do things with a performer’s performance or a sound recording typically means that the performer and/or sound recording maker (or the owner of those rights if they have been transferred), receives royalties or payment.

## MORAL RIGHTS

The Act also recognizes that authors and performers have moral rights. These rights focus on the artist/performer’s right to preserve the integrity of their work. Artists/performers can refuse any change that would be prejudicial to their honour or reputation and have the right to claim authorship or to remain anonymous.

For example, Canadian artist Michael Snow’s moral rights were famously infringed when the Toronto Eaton Centre placed red ribbons around the necks of the geese in his work *Flight Stop* during the Christmas season. Snow successfully brought an action to compel the Centre to remove the ribbons from his work.

Moral rights exist for the duration of the copyright and are non-transferable, so they only belong to the author/performer or, on death, to the person the rights are bequeathed to. When an author/performer assigns their copyright (in whole or in part), the author/performer retains their moral rights but may be asked to formally waive these rights in favour of the new owner(s).

## CONDITIONS FOR PROTECTION

Copyright only exists in original works which are fixed in some material form (i.e. put in writing or recorded). In order to be original, the work must:

- be more than a mere copy of another work;
- be the product of the author's exercise of skill and judgment; and
- be more than a purely mechanical exercise.

Moreover, copyright does not protect ideas or facts — it only protects the original expression of those ideas or facts.

Copyright also only applies to original works where the author was, at the date the work was created, a citizen or subject of, or ordinarily resident in, Canada or a treaty country. There are other instances where protection applies, as well as specific provisions addressing citizenship and residency requirements for neighbouring rights.

## OWNERSHIP & REGISTRATION

Copyright protection arises as soon as you create a work and fix it in a material form. You do not need to do anything to receive copyright protection. Your copyright is still protected in Canada even if you do not use the copyright symbol (©) in association with your work. However, using the copyright symbol reminds others that you are claiming copyright in the work, and you could rely upon your use as evidence in certain infringement cases. You may wish to register your copyright (found here [https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03915.html?Open&wt\\_src=cipo-cpyrght-main&wt\\_cxt=toptask](https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03915.html?Open&wt_src=cipo-cpyrght-main&wt_cxt=toptask)) with the Copyright Office, as registration creates a presumption of evidence of ownership.

Generally speaking, the author of a work, the performer of a performance or the maker of a sound recording are the first owners of the copyright, though certain exceptions may apply. For example, if works are made in the course of employment, there is a presumption that the employer is the first owner of that copyright.

A copyright owner may assign (transfer) their rights, in whole or in part, to another party (or parties). The assignment may be for the whole term of the copyright or for a portion of it. An assignment is a change to copyright ownership. Assignments of registered works may be registered with the Copyright Office upon payment of the prescribed fee.

As well, copyright owners may issue licences to authorize another party or parties to use a work for certain purposes and under certain conditions. Licences may be exclusive or non-exclusive and the copyright owner still retains ownership. Collective Rights Societies – such as SOCAN, Re:Sound and Access Copyright – help administer members' copyrights by issuing licences and collecting and distributing royalties.

## TERM OF PROTECTION

Generally speaking, copyright protection lasts for the life of the author, the remainder of the calendar year in which they die and for 50 years following that calendar year. There are certain exceptions to this general rule that address situations where works are created by joint authorship, where the author is unknown and where works are posthumous. Additionally, there are specific provisions dealing with the duration of copyright in performer's performances, sound recordings and signals.

The term of copyright protection will soon be extended to comply with the United States-Mexico-Canada Agreement (USMCA).

Once copyright expires, the work, performance or sound recording falls into the public domain. Anyone is then free to make use of it without obtaining permission.

## USERS

Generally speaking, users of copyrighted works, performances, sound recordings and signals must get permission to do anything that is the exclusive right of the copyright owner. Otherwise, the user may be infringing copyright and could be required to pay damages to the owner and comply with other court orders, such as delivering up infringing copies. So, before you perform someone else's song in a live stream or record it, or use someone else's photograph or art on your website, you need to get permission (i.e. a licence) from the copyright owner.

Use of an insubstantial amount of a work does not require permission from the copyright owner. However, since the Act does not define what constitutes substantial use or insubstantial use, even sampling a few seconds of a sound recording may constitute infringement.

Essentially, the Act grants a temporary monopoly to copyright owners. To balance this, the Act provides certain exceptions to copyright infringement, a few of which are discussed below. Before relying on any of the following exceptions to infringement, consult with a lawyer for legal advice specific to your situation.

## **Non-Commercial User Generated Content**

This exception is colloquially referred to as the “YouTube exception”. An individual may use an existing work, performance, sound recording or signal (protected by copyright) to create new content without consent of the owner when:

- the new content is created solely for non-commercial purposes;
- the source and (if known) the name of the author, performer, maker or broadcaster is mentioned (if reasonable to do so);
- there are reasonable grounds to believe the existing work, performance, sound recording or signal, is not itself infringing copyright; and
- use of the new content does not have a substantial adverse effect (financial or otherwise) on the existing work, performance, sound recording or signal, or on an existing or potential market for it.

## **Private Copying**

It is generally not infringement to create copies of protected works provided that:

- you legally own the copy of the work you are reproducing;
- the copy of the work you are reproducing is not, in itself, an infringing copy;
- to make the reproduction, you did not circumvent a technological protection measure;
- you do not give the copy away; and
- the copies are only for your individual private purposes.

If you sell or give away the existing copy of the work you reproduced, you must destroy any copies you made.

## **Fair Dealing**

Fair dealing allows anyone to use copyrighted works without authorization when the use is for the following specific purposes: research, private study, education, parody, satire, criticism or review, and news reporting.

However, the use must be fair in order for it not to constitute infringement. A determination of whether the dealing is fair is no simple matter. To decide, courts look at factors such as the purpose, character and amount of the dealing, as well as alternatives to the dealing, the nature of the work and the effect of the dealing on the work. If, on the whole, the factors tend towards fairness, then the use will likely be fair.

## CONCLUSION

Understanding copyright is an important part of understanding how to make money and protect the integrity of your creative works. Additionally, if you are a user of copyrighted works, it is important to understand what unauthorized use may violate copyright owners' rights and what unauthorized use may be permitted as an exception to infringement.

Please do not hesitate to contact your relationship partner or lawyer if you have any questions or if we can be of assistance in guiding you through these new challenges.

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