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# Copyright Legislation & Commentary

Roger T. Hughes
Susan Peacock

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The Honourable Roger T. Hughes
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# ABOUT THE EDITORS

The Honourable Roger T. Hughes is a judge of the Federal Court of Canada. Justice Hughes is the author of several texts in the litigation and intellectual property field, including *Federal Court of Canada Service*; *Canadian Federal Courts Practice*; *Hughes & Woodley on Patents, Second Edition*; *Hughes on Trade Marks, Second Edition*; *Hughes on Copyright & Industrial Design, Second Edition*; *Patent Legislation & Commentary* (annual edition); *Trade-marks Act & Commentary* (annual edition); *Halsbury's Laws of Canada — Trademarks, Passing Off and Unfair Competition*; *Halsbury's Laws of Canada — Patents, Trade Secrets and Industrial Designs*; *Canadian Forms & Precedents — Intellectual Property*; *and Canadian Forms & Precedents — Licensing*. He has published numerous papers and is a frequent speaker on diverse topics, including court practice and procedure; patent, trade-mark and copyright law; and media and entertainment law. As counsel, Justice Hughes has appeared in all levels of court, including the Supreme Court of Canada, in a large number of cases, and mainly in the intellectual property field.

Susan Peacock is a sole practitioner in the area of copyright and broadcasting regulation. From 1989 until 2008, she was Vice President of Copyright Collective of Canada and The Canadian Motion Picture Distributors Association (now The Motion Picture Association – Canada) a trade association of the major international motion picture distribution companies. Until 1989 she was in-house counsel for various companies in the business of television production, distribution, financing and broadcasting. From 1988 to 1996 Susan was Chair of the Board of YTV Canada Inc. She has served on Statistics Canada's National Advisory Committee on Cultural Statistics and the Program Advisory Committee of Ryerson University's School of Radio and Television Arts. Susan is a graduate of Osgoode Hall Law School and a member of the Law Society of Upper Canada.

# LEGISLATIVE CURRENCY

The legislation reproduced in this consolidation is current to *Canada Gazette*, Part I, Vol. 149, No. 6, February 7, 2015 and Part II, Vol. 149, No. 3, February 11, 2015.

Pending legislation includes the following:

S.C. 2014, c. 39 (*Economic Action Plan 2014 Act, No. 2*): sections 102-112 amend the *Industrial Designs Act*. These sections are to come into force on a day to be fixed by the Governor in Council, and are reproduced in this consolidation in shaded text.

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## *INDUSTRIAL DESIGN*



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# 2014 YEAR IN REVIEW

## LEGISLATIVE

The *Combating Counterfeit Products Act* (Bill C-8) received Royal Assent in 2014. It amends the *Copyright Act* and the *Trade-marks Act* to add new civil and criminal remedies and new border measures in both Acts, in order to strengthen the enforcement of copyright and trade-mark rights and to curtail commercial activity involving infringing copies and counterfeit trade-marked goods. Amendments to section 27 (secondary infringement) and section 42 (criminal remedies) of the *Copyright Act* came into force on December 9, 2014. Additional provisions came into force on January 1, 2015.

Most of the provisions of the *Copyright Modernization Act* (Bill C-11) came into effect in 2012. Remaining provisions relating to reciprocity of new rights to WIPO countries came into effect when the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) came into force for Canada on August 13, 2014. Remaining provisions, relating to Internet service providers, came into effect January 2, 2015 without additional regulations.

The coming into force of the WPPT triggered the coming into force of the *Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries*,[1] and the repeal of the *Limitation of the Right to Equitable Remuneration of Certain Rome Convention Countries* Statement.[2] The new Statement limits the scope and duration of protection of the right to remuneration in sound recordings originating from certain WPPT or Rome Convention countries, including the United States, that do not offer a right similar in scope and duration to that granted in Canada.

Retransmitters of terrestrial radio and television signals are required by section 31 of the *Copyright Act* to pay royalties for the works on distant signals. In 2014 the *Local Signal and Distant Signal Regulations* were amended so as to define local and distant *digital*, as well as analogue, television signals.[3]

There was no change to the status of Bill C-516 (*The Artist's Resale Right Act*) in 2014. This Bill would amend the *Copyright Act* so that the author of an artistic work in which copyright subsists would have a right to a royalty on any sale of the work for $500 or more that is a sale subsequent to the first transfer of ownership by the author. The resale right in a work would only be exercisable

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1 SOR/2014-181.
2 SOR/99-143.
3 SOR/89-254, as amended SOR/2004-33 and SOR/2014-80.

through a collective society. The definition of "artistic work" in the Bill is different from the definition in the *Copyright Act*.

## JURISPRUDENCE

Where plaintiffs can establish that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action, but if such persons are unknown because they are anonymous Internet users, Internet service providers cannot disclose the names and addresses of their customers without a valid subpoena, warrant or order. In issuing such an order (a Norwich Order), the Courts should exercise caution to ensure that privacy rights are invaded in the most minimal way. A 2014 decision of the Federal Court includes a comprehensive discussion of the related jurisprudence in the U.S., U.K. and Canada with respect to the balancing of the rights of copyright owners and the privacy rights of individuals, and ensuring that the judicial process is not used to support a business model intended to coerce innocent individuals to make payments to avoid being sued.[4]

Where an instructor was the author of a photograph of a student wearing another student's project and standing in front of a backdrop made by another instructor and located in a classroom, the Court did not accept that the photograph was created in the course of the instructor's employment, regardless of whether or not it was created during paid class time. The instructor took the photograph voluntarily and he was hired as an instructor, not as a photographer. Although the photograph was connected with the employer by virtue of its subject and the location in which it was taken, it was not taken in the course of the plaintiff's employment.[5]

Where a number of BDUs (broadcasting distribution undertakings, such as cable television systems) were jointly and severally liable with a television network for the unauthorized communication to the public of still photographs included in a documentary, there was one act of infringement; the quantum of damages does not depend on the number of intermediaries, but the number of viewers may be relevant.[6]

In 2012, the Supreme Court of Canada determined that a work or other subject-matter, including a ringtone, video game, musical work or sound

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4 *Voltage Pictures LLC v. John Doe*, [2014] F.C.J. No. 492, 2014 FC 161 (F.C.).

5 *Mejia v. LaSalle College International Vancouver Inc.*, [2014] B.C.J. No. 2126, 2014 BCSC 1559 at paras. 190, 198-209 (B.C.S.C.).

6 *Leuthold v. Canadian Broadcasting Corp.*, [2014] F.C.J. No. 656, 2014 FCA 173 at paras. 33-43 (F.C.A.), affg [2012] F.C.J. No. 903, 413 F.T.R. 162 at paras. 120-131 (F.C.).

recording, is not communicated when a durable copy is downloaded.[7] The Federal Court of Appeal has since determined that notwithstanding this decision, broadcasters continue to be obliged to license both the right to make ephemeral reproductions and the right to communicate.[8] On September 4, 2014, the Supreme Court of Canada granted leave to appeal this decision of the Federal Court of Appeal.[9]

## COPYRIGHT BOARD DECISIONS

Although listening to free previews of music may constitute fair dealing for the purpose of research on the part of potential customers, the Copyright Board did not accept that a month-long free trial of an online video service was analogous.[10]

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7 *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 34, [2012] 2 S.C.R.231 (S.C.C.).

8 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2014] F.C.J. No. 321, 2014 FCA 84 at paras. 26-49 (F.C.A.).

9 Supreme Court of Canada case number 35918, [2014] S.C.C.A. No. 249 (S.C.C.).

10 *Decision of the Board, File: Public Performance of Musical Works*, July 13, 2014, Copyright Board of Canada, paras. 59-62. Note that the Board also based its decision on the fact that Netflix (the objector) had not submitted evidence showing that it dominated the market for videos and therefore an analysis of its policy of free trials might be incomplete with respect to the overall video industry.

# COMMENTARY: COPYRIGHT

## INTRODUCTION

These notes are intended to be a brief overview of the *Copyright Act*. Readers are cautioned that many details have been omitted and many circumstances have not been considered. Other resources include the following:

- For a more detailed legal text that is updated several times a year, see *Hughes on Copyright & Industrial Design*, Second Edition (LexisNexis Canada Inc.).
- For forms and precedents, see *Canadian Forms & Precedents, Intellectual Property* (LexisNexis Canada Inc.).
- For commentary and case digests respecting the *Federal Courts Act* and Rules, see *Canadian Federal Courts Practice* (annual publication) (LexisNexis Canada Inc.).
- For encyclopedic treatment of the law, see *Halsbury's Laws of Canada – Copyright* (LexisNexis Canada Inc.).

Canada draws from two sources for its copyright laws. The British source goes back to the time of Queen Anne, when publishers were given rights to prevent unauthorized copying, hence "copyright". The other source is the European continent, particularly France, where protection was given to the works of authors. "Droit d'auteur", literally, "right of the author", is the French translation of "copyright".

The Canadian *Copyright Act* (R.S.C. 1985, c. C-42) was enacted in the present form initially in 1924; it was first proposed in 1921 and is therefore sometimes called the 1921 Act. It was modelled substantially upon the British *Copyright Act* of 1911.

Many of the most substantial amendments to the *Copyright Act* have been necessary so that Canada could adhere to international treaties which create reciprocal rights between countries: Canadian copyright owners acquire rights in other treaty countries and nationals of treaty countries acquire rights in Canada.

Canada adheres to the Berne Convention, the Rome Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and, since 2014, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Legislation intended to implement the changes necessary for adherence to the WIPO treaties received Royal Assent in 2012. Pursuant to Order in Council P.C. 2012-1392, most of these amendments came into force upon publication on November 7, 2012; amendments giving reciprocal rights to subject-matter with connections to WIPO Copyright Treaty (WCT) countries and WIPO Performances and Phonograms Treaty (WPPT) countries came into force

on August 13, 2014. Provisions relating to obligations of providers of network services to forward notices of alleged infringement will come into force in January 2015 pursuant to Order in Council P.C. 2014-0675.

Amendments to the *Copyright Act* have also been negotiated in trade agreements such as the 1989 Free Trade Agreement (FTA) between Canada and the United States and the 1992 North American Free Trade Agreement (NAFTA).

Occasionally, circumstances demonstrate the need for an amendment, often in response to new technology. The use of technologically neutral language is a means of avoiding amendments resulting from language that is too exclusive, but such language can be too inclusive. In 2001, for example, the *Copyright Act* was amended to exclude Internet retransmitters from the benefits of a technologically neutral exemption.

## ADMINISTRATION OF THE COPYRIGHT ACT

Although nominally assigned to the Minister of Industry (section 2, definition of "Minister"), in fact, copyright is handled jointly with the Minister of Canadian Heritage. The Copyright Office is administered by the Patent Office (section 46) and the Commissioner of Patents acts as the Registrar of Copyrights. Much useful information, including a searchable database of copyright registrations, is available on the Canadian Intellectual Property Office's website (<http://www.cipo.ic.gc.ca>).

## WORKS AND OTHER SUBJECT-MATTER

Copyright, in the classic sense, applies to original literary, dramatic, musical and artistic *works* and protects the author's original form of expression, not ideas. Over the course of time the subject-matter of copyright has been expanded to include performers' performances, sound recordings and communication signals, collectively referred to as "other subject-matter", not "works". Copyright in other subject-matter is more limited than copyright in works and is sometimes referred to as "neighbouring rights".

### Works

Paragraph 5(1)(*c*) of the *Copyright Act* says that copyright subsists in "every *original* literary, dramatic, musical and artistic work" so long as the author (or maker in the case of a cinematographic work) was a citizen of, or ordinarily resident in, a treaty country (a defined term) or, if the work was first published in a treaty country.

The courts of the United States and the Anglo tradition countries have wrestled with the meaning of "original", some saying that original simply meant "not copied" while others felt that it implied some "skill, judgment or labour" or that an element of "creative spark" was required. The Supreme Court of Canada has held that "original" means that "a work must have originated with the author, not be copied, and must be the product of the exercise of skill and judgment that is more than trivial".[1]

Copyright may exist in an unfinished work as long as it is sufficiently developed and beyond the state of being merely an idea.

Various categories of works are defined in section 2 of the Act:

1. *Literary Work includes* (*i.e.*, is not restricted to) books, pamphlets and other writings, tables, computer programs.
2. *Dramatic Work includes* recitation, choreography, music if fixed in writing, movies (cinematographic works) and dramatic-musical works.
3. *Musical Work means* (not "includes") any work of music or musical composition with or without words. This definition was revised in 1993: previous definitions required that a musical work had to be printed, like sheet music.
4. *Artistic Work includes* paintings, drawings, maps, charts, plans, photographs, engravings, sculpture, crafts and architectural works such as buildings, sculptures and models. This definition was revised in 1993. The previous definition required that architectural works have "artistic character" which one court interpreted as "panache".
5. *Collective Work and Compilation* are each defined in section 2. Further, the definition of "every original literary, dramatic, musical and artistic work" includes "compilations" thereof. The differences between collective works and compilations are small; either may be comprised of other works. The courts have held that even if copyright does not exist in the parts, the compilation or collection has its own copyright if it is sufficiently original. The author of a collective work or compilation is the person who compiled or collected the contents so as to create the new work, even though copyright in elements of the content may be owned by someone else. A compilation may also be an original compilation of data.

Additional defined subcategories of works, such as "computer program", are defined in section 2 of the Act. Care must be taken to make sure that all relevant definitions are considered when reading the Act.

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[1] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] S.C.J. No. 12, 30 C.P.R. (4th) 1 at para. 28 (S.C.C.).

## Other Subject-Matter

Copyright is assigned under the *Constitution Act, 1982*[2] to the federal government and is administered through the *Copyright Act*. A number of treaties have extended more limited copyrights (sometimes called "neighbouring rights") to subject-matter other than works: performers' performances (sections 15 to 17); sound recordings (section 18), and communication signals (section 21).

Copyright in performers' performances and sound recordings does not include the right to perform performances or recordings in public or to communicate them to the public by telecommunication, but owners of copyright in performers' performances and sound recordings have a right to remuneration when their performances or recordings are performed in public or communicated to the public by telecommunication in the circumstances set out in sections 19 and 20.

# REGISTRATION AND MARKING

Eligible works and other subject-matter are protected by copyright automatically when they are created. There is no need to register copyright or to mark anything on the work, as Canada adheres to the Berne Convention, which stipulates that such things are unnecessary. However, there are some advantages to doing so.

If a name is indicated in the usual way as author, performer, maker or broadcaster on a work or other protected subject-matter, the person named is presumed to be the author, performer, maker or broadcaster. In the absence of any other indication, the publisher or owner is presumed to be the owner if its name is so indicated (section 34.1). Many copyright owners mark their work with a notice such as "Copyright 2007 Smith & Co." or simply "© 2007 Smith & Co.", 2007 being the year of first publication.

Copyright may be registered in Canada by completing a simple form and filing it with the Canadian Intellectual Property Office indicating the type of work (*e.g.*, literary, musical, *etc.*) or other subject-matter (*e.g.*, sound recording), its title, the name and citizenship of the author, maker or performer, as the case may be, the name of the owner and the place of first publication, if any. No copy of the actual work or other subject-matter should be filed, and none will be accepted, which could make it difficult to prove that a particular work is the one that is registered. Registration serves as presumptive notice of copyright and is *prima facie* proof of the subsistence of copyright and other particulars; however, that

[2] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

presumption may be rebutted at trial. The courts are very skeptical of registrations secured shortly before actions are begun or during the course of such actions.

## DURATION OF COPYRIGHT

The term during which copyright endures in Canada will depend on the type of subject-matter in question and whether there are joint authors. The term of Canadian copyright is independent of the term granted by other countries to the same work in their country.

1. *For most works*, copyright ends 50 years after the end of the calendar year in which the author died (section 6).
2. Where there are *joint* authors, that is, where the work of one cannot be separated from the work of the other, the term ends 50 years after the end of the year of the death of the *last* of the authors to die (section 9).
3. Where there are *joint authors and some authors are known and others are not*, the term ends 50 years after the end of the year of the death of the last known author (section 6.2).
4. Where the *author is unknown or uses a pseudonym* that is not traceable, the term ends 50 years after the end of the year of publication or 75 years after the end of the year when the work was made, whichever is sooner (section 6.1).
5. *Posthumous works* — There is no special treatment for works first published, performed in public or communicated to the public posthumously after December 31, 1998. However, if, a work was first published, performed in public or communicated to the public posthumously and before December 31, 1998, copyright in that work subsists until 50 years after the end of the year in which the work was published, performed in public or communicated to the public by telecommunication, whichever happened first. If a work had not been published, performed in public or communicated to the public by December 31, 1998, and its author died on or before that date, one of two transitional provisions applies. If the author died during the 50 years before December 31, 1998, copyright subsists until the date that is 50 years from the end of the year of that death. If the author died more than 50 years before December 31, 1998, copyright ended on December 31, 2003.
6. A *cinematographic work* which has a dramatic character has the same term of protection as any other "dramatic work" (section 6). A cinematographic work that lacks a dramatic character is protected until 50 years after the end of the year it was made, unless it is published within that period, in which case its copyright ends 50 years after the end of the year of its first publication (section 11.1).