

Course: Copyright Law
Date: Winter 2002
Professor: Tawfik
Textbook: Courseware Kit 2002

Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

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Introduction

Copyright is one of the principal forms of IP along with Patents and Trademarks. Like other forms of intellectual property, believed to play a critical role, in driving knowledge-based economies. Today, we have a sense of what unites all of the discrete bodies of law into the generic Intellectual Property law concept. The way we treat products of the mind today as commodities in the knowledge-based economy has stifled the manufacture of product (we cannot manage low-cost production) and created distinct importance in the fields of technological development. The major asset in this new economy is a knowledge-based intellectual product.

We can identify under the head intellectual property some common threads:

1. A body of law that protects the products of the human mind as opposed to something that humans construct or extract in a tangible form;
2. Society contracts with the creator of intellectual product is the granting of exclusive rights for a fixed period of time in exchange for its disclosure and dissemination;

Originally copyright was designed to protect the artistic spirit in people. The Copyright Act specifically protects literary, artistic, dramatic, and musical works – it was originally conceived of to protect the arts. It was not until the late 1980s when there was a deliberate international decision to route computer software under the head of copyright that the revolution of copyright really took hold. It is because of the rooting of important new technologies under the umbrella of copyright that has resulted in the explosion of copyright issues in the legal forum. The Internet itself, for example, has us come to grips with Copyright as an important vehicle for the protection of human creation.

Copyright Defined

From Gutenberg to Telidon – “The legal recognition of the exclusive right of a creator to determine the use of a work and to share in the benefits produced by that use.”

In Re Dickens (1935) – “A twofold right involving both the exclusive right to publish and the exclusive right of multiplying copies of a work”.

s.2 *Copyright Act* – “Copyright means the rights described in ss. 3, 15, and 26, 18, 21”

Section 3: “For the purposes of this Act, copyright in relation to a work means the sole right to produce or reproduce the work or any substantial part thereof in any substantial way whatever...” The right rests with the author to do any of those things listed in section 3.

Historical Foundations

Copyright is a fairly recent phenomenon. Copyright law and the concept of a copyright in creative expressions originated as a result of two principal factors:

1. The invention of the printing press and the resulting Stationers’ Company in England (allowed for texts to be reproduced in multiple copies) – Printing is invented and all of a sudden literature is liberated. This possibility led to two competing interests in finding a common ground to satisfy the parties involved: the printing press was not cheap and those who invested wanted some return on their capital – monopolies were requested and thereafter granted monopoly rights by the king in exchange for the express agreement by the publishers to censor those works that the king

deemed unsuitable for publishing. It was initially characterized as exchanging publishing rights for trade regulation; and,

2. The rise of individualism illustrated by John Locke's concept of natural property rights and the Romantic poets assertion of the genius in authorship.

'Copyright' Analyzed

Had the etymology merely evolved from the idea, "Right to the copy"? A registry was created in early England through the publisher's guild all of the works that listed those works that could be copied and saved from regulation. This guild lasted for approximately 100 years, but as the 18th century approached the political climate in England had begun to change. The publisher's, who had amassed great wealth, were looked upon with suspicion by the masses. Also, there was a point at which the Crown started to lose its absolute authority over its activities within the realm – members of the nobility started having more say in the ways in which England was to be governed. Thus, the Stationers' Company came under heavy public scrutiny and the fixed license for publication by the Crown was up for renewal. Moreover, the idea of property as an individual right gained salience.

Locke asserted that all individual's had an entitlement not only to property, but to anything that the individual laboured over and generated. This is not rooted in the law of the state, but in natural law – it is universal. Any person has the right to the fruits of his or her labour, including his or her intellectual labour. Those in society began to develop the notion of authorship. An aura of genius was vested in the concept of author – we extol the author as an individual who rises above the masses to speak and bring beauty and art to the world.

The dynamic changed – it was no longer a compact between a new burgeoning industry and the Crown: many more voices now belonged at the table. As such, the Crown refused to renew the monopoly and license. The Stationers seeing that their industry was open to competition decided to make a strategic alliance and went to parliament on behalf of the authors claiming that the only way that literature could be disseminated is through the publishers' printing press – the publishers took the approach of representing the authors.

First Copyright Act

Statute of Anne (1710)

Preamble: Whereas printers have of late frequently taken the liberty of printing, reprinting and republishing books without the consent of the authors or proprietors of such books... for preventing such practice and for the encouragement of learned men to compose and write useful books.

By giving the author protection over his or her work, society gives those authors the incentive to produce more works, which is ultimately for the benefit of the whole of society. For most of our copyright history the bulk of copyright law is targeting literary texts.

Copyright Today

Modern copyright is a statutory construct governed by the terms of the *Copyright Act* and increasingly by international trade and copyright treaties. The preeminent copyright treaty is the *Berne Convention for the Protection of Literary and Artistic Works*. The most influential international trade treaty is the *WTO – Agreement on Trade Related Aspects of Intellectual Property*.

Berne Convention

The Berne Convention is probably one of the oldest and most successful intellectual property treaties in the world. Signed and ratified by ten countries on 9 September 1886 on the heels of a meeting convened by Frenchman Victor Hugo.

The Convention established the following principles:

1. *National Treatment* – Any state that is a member of a treaty in which national treatment is imposed must give to the citizens of another signatory country the same rights and entitlements that it gives to its own citizens – For example, an Englishman would benefit in France from the same treatment that France would accord to its own citizen;
2. *Automatic Protection for authors of Works* – there is no registration requirement in copyright law;
3. *Term of Protection* – an author will be given the protection for the duration of his or her life plus fifty years after the author's death;

The convention has been revised a number of times to meet technological changes. The most important revision was *The Paris Revision 1971* – noted for an increased focus on the rights of the author as opposed to any other interest the copyright paradigm sought to protect.

Canada, as an importer of copyright works, was reticent in moving toward stronger author's rights because the country does not have a sufficient number of authors to have the impact the *Paris Revision 1971* was tailored for. Canada is now a signatory to the revision after being coerced by the United States – one of the stronger producers of intellectual property products.

Concern – if you can print books and travel across the ocean, you can take those books and publish them in the jurisdiction in which they were not originally published without any worry of international ramifications. For example, British literature was making its way to America where it was copied in order to bring the old world culture to the new world. British authors got no return from American readers, thus, providing no incentive for American readers to purchase from the British source directly. The impetus was trying to convince countries around the world to sign on to a system reducing the threat of piracy to mitigate the threat of authors terminating their production.

In imposing a model we are developing a global system preventing the appropriation of works internationally. Arguments of cultural imperialism were originally directed to the United States (Irony!).

WTO/TRIPS

In force in Canada by virtue of an *Act to Implement the Agreement Establishing the World Trade Organization*. International authors would be hesitant in entering markets that have little intellectual property protection. The United States recognized this and set about to establish regional and multilateral trade agreements including intellectual property codes in their own self-interest. (Take a look at Chapter 17 of NAFTA). Incorporated in the Uruguay Round of GATT is the TRIPS agreement – this shift towards including IP in international trade agreements shifted the copyright track from the Berne Conventions.

Canada's copyright history as a British Colony adopted the British Act in the form of our Copyright Act 1924. At the time, Britain was an original signatory to the Berne Convention. When Canada adopted the Copyright and incorporated the British regime it also became signatory to the Berne Convention by virtue of being a British Colony. The US was never a member of the Berne Convention, it only became a member in 1988. It was a time at which the US began to solidify the notion that it would move towards a knowledge-based economy and intellectual property would become the new product.

The US, as a frontier country wanting to dissociate itself from the colonial roots, wanted to venture off onto its own – its interests would not be served by signing on to a copyright treaty. The other factor was that the US was suspicious of the Berne Convention – the only common law jurisdiction to sign the convention was England and given that the US has a common law copyright system it didn't like the way the treaty was drafted because it was unacceptable from a civil law perspective.

When we return to the notion of an author as inspired and endowed with genius we see that the construct developed in Europe. In terms of the terminology, copyright was characterized as 'the right to copy' or 'the right to the copy'. In these characterizations, who is being protected and favoured? The difference lies in shifting the focus from the publisher to the author – the author wants to be favoured in the new law. It depends upon where you place your value in terms of how you structure the legal system. The continental Europeans placed the value in the author – the author has the absolute right to tell the world how his or her work should be exploited. For the US to look at a Berne Convention, which smacks too much of an author's rights convention, is really not where they want to be. The Berne Convention establishes minimum guidelines the derivations to which were minimized.

The Berne Convention Article 6 – The nub of an author's rights system by recognizing that an author has both economic and moral rights to a work. As the creator of an artistic output, not only does the author have a right to it, but because it is an extension of oneself, the author can prevent anyone from doing work that the author finds unconscionable.

The French version of the Copyright Act is "Les Lois de les droits de l'auteur" – The Rights of the Author. Canada was one of the first countries to have a moral rights provision in the Copyright Act. The Americans, however, are most incensed in having to deal with the irrational tastes of authors. The US is the only jurisdiction that has not expressly incorporated into its Copyright Act a moral provision.

The US did not like the fact that copyright under the Berne Convention arose automatically – historically under the US Act you had to register before copyright rights could be enjoyed. In order to have a comprehensive Copyright relationship with the United States, countries had to join the Universal Copyright Convention of which the US acknowledged in not signing Byrne.

Intellectual products began to become the basis for business in an emerging new economy. The US found itself in an awkward position: on the one hand, the US is trying to convince the world that we need strong IP protection and, on the other hand, the US will not join the one convention with the largest membership espousing the strongest protection for IP products. The US gave in, but with a moral rights exclusion, and agreed to make the *Paris Convention 1971* the universal standard. Any member of the WTO, in order to conform to the text of the treaty, must meet the criteria for eligibility of the Berne Convention. To benefit from the International Trade Agreement, there would have to be conformant to the convention.

Interestingly, countries that care very little about IP, but wish to be members of the WTO for the purposes of agriculture, for instance, must accept the IP requirements of the WTO and bring their jurisdiction up to standard.

Byrne is revitalized only the extent that it has been incorporated into the trade agreement. When concerns in the copyright context have arisen, specific treaties have been enacted to deal with certain issue. WIPO: Performers and Producers of Phonograms and Copyright Treaty originated in WIPO under the Byrne umbrella and will continue being incorporated into trade treaties to harmonize intellectual property law worldwide.

The present revisions of the Copyright Act is an attempt to conform to worldwide standards that have yet to come into effect.

The Copyright Balance

The notional background is that copyright is designed to reward the author, but always with the view to the public interest in creating incentives for further creation and the competing interest in providing access to creative works for the benefit of society.

The Canadian Copyright Act (1985)

First enacted in 1924, virtually a reproduction of the British Copyright Act and it remained unamended until the first phase of important copyright revisions in 1988.

- Phase I 1988 – The focus was on bolstering the rights of the author. The reform was based on the White Paper of Copyright Reform (From Gutenberg to Telegon) and the Charter of Rights for Creators. The phase was designed to reward creative activity and to clarify and extend moral rights to the authors.
- Phase II 1997 – The notion of giving any greater rights to users became a concern rather than an objective. The notion shifted from balancing competing interest in copyright to protecting the author’s interest specifically. Protecting the author gives the author incentive to create by vesting all of the rights virtually in the author. Significant about the Phase II amendments was the introduction of a blank media levy.
- Phase III In Progress – Consultation on digital copyright issues
<http://strategis.ic.gc.ca/SSG/rp01100e.html>

General Principles of Copyright Law

1. Copyright is a statutory right – whenever you look at a copyright issue the starting point must be the Act as any right must be one conferred by the statute, the jurisprudence is used in interpretation;
2. Copyright is a right that is distinct from the ownership of the material with which it is associated – thus, one must sever the interest in the tangible from the intangible where the tangible interest is separate and distinct from the intangible copyright interest;
3. Copyright protects the expression of the idea and not the idea itself – we protect the particular way in which an author expressed an idea;
4. Copyright protects works that are fixed in some material form – they have to be expressed in some tangible way;
5. Copyright protects only original literary, artistic, musical, and dramatic works;

One – Copyright versus Property in the Material

Copyright is a right that is distinct from the ownership of the material with which it is associated. Thus, once must sever the interest in the tangible property from the intangible copyright rights.

In Re Dickens (1935) Eng

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Dickens, in his will, left his private unpublished papers to his sister-in-law and his copyright to his estate 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Does ownership of private papers transfer with it the copyright interest or right to publish? ○ The property right in the tangible object is separate from the intangible copyright right 	<ul style="list-style-type: none"> ○ A person in possession of the tangible item may not republish without the permission of the copyright owner

Note: if the object was to publish the manuscript, the two would have to co-operate in order to publish. The estate can estop the sister-in-law from reproducing the work in this case.

Moorhouse v. Angus & Robertson (1981) NSW CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Author entered into a publishing agreement with a publishing house ○ In order to publish the author had to physically transfer the manuscripts to the publishers ○ The books were published and the author requested the manuscript to be returned 	<ul style="list-style-type: none"> ○ Defendant argued that the author gave them ownership of the manuscripts upon handing them over ○ Handing over physical property for the publication of the expression does not necessarily mean the transfer of ownership in that thing 	<ul style="list-style-type: none"> ○ Copyright is a separate interest that vests in what is expressed on the tangible medium and not an interest in the physical medium itself

Two – Idea versus Expression Dichotomy

All forms of intellectual property exist to balance competing interest: the idea is that we want to encourage continued artistic activity and output. At the same time, we do not want to stifle progress and innovation. Full author's rights threaten to stifle innovation and progress, while little regulation would provide no incentive for the creation of artistic works.

A number of doctrines have developed with regard to what is protectable as a copyright interest and what is not protectable. Copyright protects the expression of the idea and not the idea itself – we protect the particular way in which an author expressed an idea.

Moreau v. St. Vincent (1950) Ex Ct

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Owner claimed copyright over a contest picking winners in a certain sporting context ○ The contest was devised to engage more subscribers/readers ○ The contest involved: (1) a numbered receipt; (2) list of sports clubs; and (3) a questionnaire or quiz ○ Plaintiff was claiming copyright in its contest – defendant was employed by plaintiff and later went into competition with him ○ Defendant started his own contest, not related to sports in the same way, but involved the same three elements 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Was there copyright in the structure of the contest – the three elements that were used in both contests? ○ The law does not protect the plaintiff because the defendant merely took the plaintiff’s idea and not the plaintiff’s expression of that idea ○ Plaintiff did not show that the work was copied – note: copying does not need to be word for word 	<ul style="list-style-type: none"> ○ Copyright protects the expression of an idea, not the idea itself ○ Ideas are public property while literary works belong to the author ○ Copyright arises automatically from authorship ○ There is no copyright in a business method, but only the descriptive expression of that method

The cases are not consistent and we have to grapple with social policy – there is more at play than mere normative questions, there are other commercial interests that come into play. The idea/expression dichotomy does not get us very far because it depends on what the court considers to be idea and expression – broad or narrow? Oftentimes it depends on the result that the court wants to reach. The dichotomy is not dealt with much by the court anymore because it has become far too tricky to deal with. The courts will deal with it in terms of ‘fixation’. Consider the ‘merger doctrine’ that was developed in the United States and not wholly accepted in Canada:

Morrisey v. Proctor & Gamble (1967) US FC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff holder of a set of rules for a contest ○ Defendant copied a rule ○ Plaintiff sues, defendant alleges that the rule was not copyrightable 	<ul style="list-style-type: none"> ○ A particular form of expression cannot come from the subject matter – this would prevent a competitor from expressing that particular subject if there is no other way to effect the idea ○ The courts came up with the ‘merger doctrine’ 	<ul style="list-style-type: none"> ○ The subject matter is appropriated by permitting the copyright of expression ○ If you are dealing with a situation where there is a very limited number of ways of expressing the idea, the idea and expression will have merged and there can be no copyright in the work

Three – Fixation

Copyright protects works that are fixed in some material form – they have to be expressed in some tangible way. The idea has to be fixed in some material form. Designs, in general, might be protected under industrial design law – but this has gained very little notoriety.

Merchandising Corp of America v. Harpbond (1983) FSR

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Adam Ant changed his facial make-up and posters of his ‘new-look’ were reproduced and circulated without his permission ○ The company owning the merchandising rights in Adam Ant attempted to sue 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Could make-up on a face ever be considered a painting? ○ The court was appalled at the suggestion – it was fantastic to suggest it ○ A painting has to be on a surface of some kind 	<ul style="list-style-type: none"> ○ There is a general resistance to protect art that is not fixed on a permanent canvass

Four – Originality

Copyright protects only original literary, artistic, musical, and dramatic works. All one has to show, as a plaintiff is that the work originated with the author – it does not have to be of high quality and etcetera. This theory is based on the notion that the more you protect the more incentive you create. Two points generally:

1. The more you cover through copyright law, the more you create this incentive; and,
2. We do not want the court to make determinations as to what is art, literature, and etcetera – the assessments become too difficult.

Copyright is not an absolute monopoly as patents are – all that is being protected is the right to copy the work. For example, if one does not have access to the author’s work and came up with the exact same expression, there can be no copyright infringement. Patents, on the other hand, would protect the author from the unknowing new creator. Intention is sometimes irrelevant.

University of London Press v. University Tutorial (1916) Eng Ch

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Math professors drafted exam papers for a University – these exam problems were taken and then reproduced with answers as a study guide ○ The defendants took the questions and reproduced them in a similar fashion 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Could an exam question prepared by a professor constitute a copyright work? ○ A ‘literary work’ is anything expressed in writing or in print ○ The test of originality – the work should originate from the author ○ Court holds that the exam questions were literary works by definition and they were original enough in the copyright sense – they originated with the individuals 	<ul style="list-style-type: none"> ○ So long as a literary work originates with an author, regardless of novelty, will be protected by copyright law

Unfair Competition – we do not have a tort of unfair competition or unfair trade practices. We would like to protect a plaintiff from someone else taking advantage of effort, but we do not have a way of doing it in our discrete body of law.

In-Class Hypothetical

An author publishes a book with a protagonist named “Thursday Next”. A promotional website is setup by the author as www.thursdaynext.com. Tawfik comes along with her own site, www.thursdaynext.net. None of the work of the original is reproduced. In light of the readings so far and those for next week,

ignoring whatever domain name or trademark recourses that you may have, consider this case solely on the basis of whether you could assert copyright infringement against Tawfik.

Can the name of a character constitute a 'literary work' for the purpose of copyright law? The name has to be distinct. However, we have trouble with copyright in a single word or a small string of words.

In-Class Hypothetical (Compilation Cases)

In CCH Canadian, the FCTD held that the headnotes of cases were not sufficiently 'original' for CCH and Carswell to benefit from copyright protection.

In light of the readings on the issue of originality in factual compilations and in terms of your own experience of the legal profession, try to anticipate the judgment of the FCA on this issue. Would the judgment you anticipate reflect a just result not only in terms of what the law is but also what you believe it ought to be? Look at section 12 of the Copyright Act for some context!

Copyright in Literary Works

A “literary work” is a work in “print or in writing” and would include letters (British Oxygen), theses (Breen), speeches/lectures (Walter v. Lane). A “literary work” must be “original” as in not copied (University of London Press). A “literary work” should afford information, instruction or pleasure in the form of literary enjoyment (Esson).

Generally

Breen v. Hancock House Publishers (1986) FCTD

Facts	Holding
<ul style="list-style-type: none"> ○ Plaintiff submitted a thesis to the University of Alberta ○ Five years later the defendant made liberal use of the work in his own book on the same subject ○ Plaintiff brings an action 	<ul style="list-style-type: none"> ○ Academic papers are entitled to the protection of the Copyright Act ○ The use of the paper constituted an appropriation of the skill, time, labour, and talent of the plaintiff

Flamand et al. v. Societe Radio Canada (1967) PQ SC

Facts	Holding
<ul style="list-style-type: none"> ○ Plaintiff produced a tv series entitled ‘Doctor Today’ ○ Defendant, some five years later, developed a show directed and the municipal and nursing professions of the same name 	<ul style="list-style-type: none"> ○ A title cannot form the object of copyright independently of the work to which it relates unless it is ‘original and distinctive’ (trademark)

Preston v. 20th Century Fox Canada (1990) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff wrote a story about Olaks and Ewoks living on another planet ○ A friend worked at a manuscript and called it “Space Pet” ○ The script was sent to the defendants, who never acknowledged its receipt ○ The defendants produced “Star Wars” and featured a story of furry creatures living in a distant planet ○ The characters were not named in the film, but at the end credits were called ‘Ewoks’ 	<ul style="list-style-type: none"> ○ There was no substantial similarity between the script “Space Pets” and the movie “Star Wars” ○ The average observer would find no substantial similarity in the script and the film ○ The characteristics set out in the script did not delineate the character of the Ewok sufficiently distinctly to qualify for copyright 	<ul style="list-style-type: none"> ○ Only in quite exceptional circumstances will copyright vest in a name

Example One

Suppose a professor is lecturing and a student types the lecture by paraphrasing, commenting, formatting, and organizing the material in his or her own fashion. Is there something worth protecting? Suppose the student typed out the lecture verbatim – is there something worth protecting? By whom and for whom? What do we accept as the copyright construct? If the student can demonstrate that s/he has exerted some

skill and effort in rendering the lecture and producing the text, s/he may then assert some copyright. However, no student may stop another from affixing the words.

If we were to extend copyright to the editor of compilations, why would we do so? The arrangement of the work affords the editor sufficient justification for copyright protection. While it is true that anybody could arrange a number of works into a compilation, the fact is that not everybody does – in this respect, copyright law encourages the editor to create compilations and organize seemingly different and independent works into a single compilation/arrangement. When we say that we are going to protect the compiler we do so because we feel the compiler is adding something to society and if we do not protect the compiler the process of compiling will end.

What we see is copyright law becoming a device to deal with questions of unfair competition rather than dealing with some sort of construct that looks at the work in and of itself. Copyright attempts to manage and regulate the way in which the copier deals with a particular work. Arguably, because we want to encourage incentive in compilation the editor is given particular rights.

Factual Compilations

What is the basis for asserting that a work is ‘original’? Should skill and labour be enough to assert ‘originality’? A number of cases suggest that skill and labour should be enough to meet the test of originality for copyright. Recall that originality means that the work ‘originates’ with the author. Thus, the question turns to whether there is any originality in compiling and the courts have said that there is sufficient skill and labour that goes into compiling a number of works together into a single compilation.

Telephone Books – what is there about the selection and arrangement of a telephone book that originates with the compiler? Question: how many ways can you express the content of a telephone book? If we give copyright protection to the selection and arrangement of a telephone book based solely on the effort, then we basically violate a copyright tenet and give a monopoly – discourages competition. The courts are saying that the work needs to originate with the author and the author must demonstrate some modicum of creativity (some originality and a minimal degree of creativity).

Elanco v. Mandops (Eng CA)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff manufactured weed killer ○ The can had instructions ○ The weed killer itself was protected by a patent that had expired – defendant produced a competing product ○ Defendant published how-to instructions verbatim – then re-wrote their own instructions 	<ul style="list-style-type: none"> ○ Invariably, the use instructions will sound very similar to the plaintiff’s use instructions ○ Court held, however, for the plaintiff 	<ul style="list-style-type: none"> ○ Be weary of this case!

Note: Why was the merger doctrine not applied? There are so many ways that an expression, such as how-to instructions, can be expressed. See *Morrisey v. Proctor & Gamble* (1967).

British Columbia Jockey Club v. Standen 73 (1985) BCSC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff published a deal of information regarding horse races including a number of fields 	<ul style="list-style-type: none"> ○ The defendant has appropriated the labour and skills of the club in compiling the information 	<ul style="list-style-type: none"> ○ The court will stop a defendant who takes advantage of the work of the plaintiff – the court will look

<ul style="list-style-type: none"> ○ Defendant published a competing racing sheet ○ Defendant took the plaintiff's sheet for some of its information and developed its own by incorporating other info and organizing the sheet differently ○ Plaintiff objects 	<ul style="list-style-type: none"> ○ The merit of the compilation of information resides in the painstaking tasks which have been performed in assembling the information ○ The defendant should have gone to the same thought process in developing its own sheet 	<p>more at the conduct of the defendant even if it means conferring copyright on works that would otherwise be looked at as problematic</p> <ul style="list-style-type: none"> ○ "No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information"
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Problem: The common law does not have recourse for unfair competition.

Ladbroke (Football) Ltd. v. William Hill Ltd (1964) HL

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Information was provided on 'coupons' so that English soccer fans could gamble on the results ○ The defendant developed a competing coupon using some of the arrangement of the plaintiff's and some of the information ○ Defendant used a different order than that of the plaintiff and added other information 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Whether copyright protection can be ascribed to the effort the plaintiff put in creating the coupon ○ Was the court dealing with anything different from <i>Smythson</i>? ○ The coupon was sufficiently original because of the skill, judgment, and/or labour applied to them 	<ul style="list-style-type: none"> ○ US courts call the effort expended in compilation the 'sweat of brow' ○ <i>University of London Press v. University Tutorial Press</i>: "Rough practical test that what is worth copying is prima facie worth protecting"

Cramp & Sons. v. Frank Smythson

Facts	Holding
<ul style="list-style-type: none"> ○ Pocket diary with standard information on the back 	<ul style="list-style-type: none"> ○ A compilation is not copyrightable where the selection of 'goblets of information' is commonplace in both selection and arrangement

Slumber-Magic Adjustable Bed v. Sleep-King () BCSC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ An advertising brochure for beds was developed by the plaintiff, which was a large part of their marketing strategy – critical to their sales method ○ Defendant produces a similar brochure ○ The plaintiff's brochure was very similar to other brochures 	<ul style="list-style-type: none"> ○ <i>Issue</i>: How could it be said that this particular brochure originated with the plaintiff? ○ The fact that elements of its brochure were similar to elements of other brochures, does not negate the fact that it has copyright in the arrangement of ideas, original or otherwise, which was solely the product of its own work, skill, and judgment 	<ul style="list-style-type: none"> ○ One may have copyright in the arrangement of ideas

Judgment seems to indicate some exercise of creativity and mind over the work. Arguably, 'work, skill, and judgment' could denote that the courts are looking for some element of creativity. Inevitably, as the right case came before the courts, the Canadian courts started to become seized of cases close to their facts of the telephone book situation. The Canadian test for compilation was 'skill, labour, or judgment' with a willingness to exclude 'judgment' considering only the effort behind the creation of the work.

Bulman Group Ltd. v. “One Write” Systems Ltd (1982) BC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff accounts using business forms in ‘one-write’ systems ○ Defendant copied the forms as they were useful ○ The defendant’s conceded that the forms were original 	<ul style="list-style-type: none"> ○ <i>Issue:</i> How could one have copyright in the forms? Do they have to communicate something as literary expression? ○ The court protected the forms ○ Can one ever show independent creation in forms once such forms reach the public? ○ For copyright to subsist there must be, in a compilation of a commercial type as here, a literary sense of functionally assisting, guiding, or pointing the same to some end must exist 	<ul style="list-style-type: none"> ○ The test of originality does mean originating with the author in the sense that there is some imprint of the author in the work ○ For copyright to subsist in a compilation of the commercial type, there need only be a literary sense of functionally assisting, guiding or pointing the way to some end

White Paper on Copyright Reform – there is a recent trial level decision that appears to restrict the practice of duplicating blank business forms. The majority of the industry in Canada is in favour of removing copyright protection over forms and grids as such. The government believes that protected works must convey a certain amount of literary, pictorial, and musical expression. The format, arrangement, and typography of forms will not be eligible for copyright protection.

Note: The White Paper was created under a Liberal government and by the time it was reviewed a Conservative government was in power, which rejected a number of proposals.

U&R Tax Services Ltd. v. H & R Block Canada Inc (1995) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff decided to develop a form anticipating the Canadian government tax requirement would illicit the use of the forms ○ Defendant devised a similar form 	<ul style="list-style-type: none"> ○ <i>Issue:</i> How distinctive can a tax form be? ○ A work must be original in order to be afforded copyright – industriousness is sufficient (or labour and time expended) to extend a copyright interest ○ Court is saying that labour will be enough to confer originality 	<ul style="list-style-type: none"> ○ ‘Industriousness’ or effort is enough to connote copyright – this has been since overturned

Should we require some measure of “creativity”?

Tele-Direct Inc., v. American Business Information Inc (1996) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ Some courts misunderstood the statute and developed a new theory to protect factual compilations through ‘sweat of brow’ – the mission of copyright is not to reward the effort of the author – the sweat of brow doctrine is wrong (overruling U&R Tax) 	<ul style="list-style-type: none"> ○ This case was appealed

Feist Publications Inc. v. Rural Telephone Co Inc.,

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Feist wanted to create a phone book covering a larger region than just Kansas ○ Feist had approached eleven service areas that covered the jurisdiction ○ All except Rural allowed the use of information contained there 	<ul style="list-style-type: none"> ○ To give copyright to a telephone listing would prevent anyone else from carrying on the business of creating telephone books ○ There is nothing remotely creative about organizing names in a directory – it lacks the modicum of creativity to make it original 	<ul style="list-style-type: none"> ○ The court distinguishes between originality and utility

Compilations

A compilation, under section two of the Act, is a *work*. There is no question that a compilation of works would be protected as a separate work under copyright work. The nature of the protection, however, is more limited. Take an anthology of poetry, for instance, copyright law as an original work protects the individual works themselves. When the poems are compiled copyright law will protect the selection and arrangement of the works, which constitute an original compilation in and of themselves. The copyright that the compiler holds will not grant to the compiler the copyright to the underlying poems. At a very general level, the compiler would be able to protect the compilation from direct reproduction – photocopying, for example, the entire book or a substantial part of the book. However, if all that was copied was one of the poems, it is questionable whether or not the compiler may proceed. What we are doing is trying to assess what goes into compiling information rather than creating from nothing.

Compiling Facts

At root copyright is looking to protect the creative output of the human being. As such, the compilation of arrangement of a number of works in a particular way will be protected. If you cannot find this imprint of the person, is there something else that copyright needs to think about in order to protect the compiler of the telephone directory.

Should skill and labour be enough ‘originality’?

Recall: Ladbroke (Football) Ltd: “Skill, judgment, and labour”; *British Columbia Jockey:* “Work, skill, judgment and knowledge”; *Slumber-Magic:* “Work, skill and judgment”; *Bulman:* “Judgment, skill and labour”; and, *U&R Tax:* “Labour or time”

In *U&R Tax* the Canadian Federal Court came right out and said that copyright protects effort alone (“labour or time”). These cases are really saying that labour alone is really sufficient. This case’s position is equivalent to the position that industrious collection alone would suffice to impose copyright on a compilation of facts. The most glaring difficulty with taking this view is its effect. If a compilation can be the subject of copyright it means that the copyright holder has the right to control the use of the work for 50 years (if it is an individual author). Effectively, that copyright holder will be able to prevent anyone else from, in the case of a telephone directory for instance, compiling a competing telephone directory. The Anglo-Canadian tradition would say that it is perfectly within the purview of the defendant to unfairly compete against the plaintiff. However, the line must be drawn somewhere: the Canadian courts did so with the words “Work, skill and judgment”. *U&R Tax* sent out alarm bells because it was the first enunciation of simply ‘labour or time’. *U&R Tax* is not the law in Canada.

Feist Publications Inc., v. Rural Telephone Service Company Inc., (1991) US SC

Facts	Holding
○ Not Done	○ Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented ... copyright rewards originality, not effort.

“It may seem unfair that much of the fruit of the compiler’s labour may be used by others without compensation. The primary objective of copyright is not to reward the labour of authors, but to promote the progress of science and useful arts.” Page 39.

Tele-Direct Inc., v. American Business Information Inc., (1997) FCA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Tele-Direct is the exclusive licensee of Bell Canada to produce phone books in Ontario and PQ ○ Defendant published a yellow page directory in competition ○ Plaintiff admitted that it had no copyright in the names ○ Def admitted the plaintiff had copyright in the book as a whole ○ Trial judge denied copyright b/c there was only a minimal degree of skill, judgment, or labour 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Whether the selection of the headings was sufficiently original to confer copyright? ○ FCA upheld the trial judgment ○ Labour alone is not sufficient to confer copyright protection – Canadian law requires a minimal degree of intellect and creativity 	<ul style="list-style-type: none"> ○ The Canadian test for originality is ‘skill, judgment <u>and</u> labour’ which is equivalent to the US test under <i>Feist</i> – effort alone will not suffice – The standard to be used in measuring the test is one of ‘Intellect and creativity’ ○ All three components are required, not just one – the word ‘or’ should be read as ‘and’.

The courts use a number of terms in order to describe the amount of originality that is required in order to meet the criteria of ‘skill, judgment and labour’. This decision established a basis under which a number of Canadian cases have relied. The issue that the FCA was seized with was the impact of NAFTA on Canadian copyright law, specifically Article 1705. The FCA held that parliament’s intention in including the word ‘compilation’ in the copyright act was to adhere to the NAFTA stipulation, which was an obligation to follow the creativity school of thought opposed to the effort school of fact. In effect, the FCA rejected the Canadian *U&R Tax* decision in favour of the US *Feist* decision.

Did NAFTA really oblige us to do this? Interestingly, Australia, which finds its roots in British law as we do, came to a completely different result. The FCA, then, relied on NAFTA to justify its decision.

European Union Database Directive

Databases are dealt with under two heads:

1. Database Copyright – databases that meet a minimum threshold of creativity; and,
2. Misappropriation – protection from free-riding in the creation of a competing database.

Can the ‘springboard’ doctrine be applied in the context of Canadian copyright law? There is a strain of British copyright law (and Canada before *Tele-Direct*), which provides that free-riding in business should be deterred. The aftermath of *Feist* was decisions such as *Kregos*. The aftermath of *Tele-Direct* are decision such as the Canadian CCH decision.

Kregos v. Associated Press (1991) US 2nd Circ

Facts	Holding	Ratio
○ Plaintiff developed a pitching form	○ Pitching form is sufficiently creative as it	○ Dissent: there was merger

<ul style="list-style-type: none"> ○ Plaintiff selected out of a multitude of items information to include what he felt were 9 key pieces of information ○ Plaintiff argued that his form was ‘new’ and different from others that were developed 	<p>displays a modicum of creativity</p> <ul style="list-style-type: none"> ○ The merger doctrine – how many different ways can the form be expressed? ○ ‘Every compilation of facts can be considered to represent a merger of an idea with its expression’ ○ Under the merger doctrine there could never be a copyrightable compilation of facts 	<p>of the idea and expression in this case</p> <ul style="list-style-type: none"> ○ Characterizing an idea in such a way as to preclude any other way of expressing the idea will be caught under the merger doctrine
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Three cases arose in Canada after *Tele-Direct* that held that the FCA did not change the test of originality, but only clarified the test to mean ‘more than effort’ and narrowing it down to ‘imagination and creative spark’ – these terms mean more than a modicum of creativity.

Hager v. E.C.W. Press

Facts	Holding
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ The standard for originality in Canadian law is that a work must display a minimal degree of skill, judgment and labour

What does a law publisher do? How is a head note constructed? The issue really comes down to where Canadian copyright law has come down to in relation to permitted acts. There was no question that an individual lawyer could go to the great library, pull down a head note, and be saved under the fair dealing defense.

CCH Canadian Ltd. v. Law Society of Upper Canada (1999) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The Law Society operated a custom photocopy service where, for a fee, it would provide photocopies of materials requested by users by mail or fax ○ Some of the works of the plaintiff Publishers were copied: Three reported judicial decisions, headnotes to the reports, a case summary, a topical index, part of a textbook, and a chapter in another textbook ○ Law Society argued that the Publishers had no standing as they were not the original owners of the copyright; their service fell within fair dealing as the purpose was for private study or research ○ Law Society argued that there was an implied license in that the Publishers allowed them to provide service for a number of years 	<ul style="list-style-type: none"> ○ The action is allowed in part ○ There was insufficient originality in the three law reports; the headnotes, the case summary, and the topical case index for copyright to subsist, as they lacked the imagination or creative spark essential to a finding of originality ○ Even though the ultimate use of the copies might be within the ambit of Fair Dealing, the Law Society’s copying was not ○ Any <i>Charter</i> arguments must fail as the Law Society does not have the standing to advance them – there was no breach of their own rights 	<ul style="list-style-type: none"> ○ Headnotes (compilations as such) lack the imagination and/or creative spark essential to a finding of originality <p>Note: The FCA has since rendered a decision – you should be familiar with it</p>

Computer Software Copyright

Software is protected as a literary work under the *Copyright Act* sections 2, 2.5, 3(1), and 30.6 and under International law in the WIPO Copyright Treaty, NAFTA, WTO/TRIPS.

“Computer Program” – means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result

In the case of a computer program the unique right to rent the program out is given to the copyright holder in the *Copyright Act*. In relation to software, there is a distinct right given to the software copyright holder that is not given to any other copyright holder.

3(1)(h) in the case of 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, to rent out the computer program

The moment an individual installs the software and the computer makes a copy of it, the question arises as to whether installing or using software is always going to be an infringement of copyright. The provision was really designed to deal with the scenario of software floating out around in diskette form. The only way for copyright holders to manage their interests in the Internet world is to embed codes that make it nearly impossible for individuals to copy the software.

2.5 An arrangement, whatever its form, constitutes a rental of a computer program or sound recording if, and only if, (a) it is in substance a rental, having regard to all the circumstances; and, (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.

30.6 It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright to,

- (a) make 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,
 - (i) essential for the compatibility of the computer program with a particular program,
 - (ii) solely for the person’s own use, and
 - (iii) destroyed immediately after the person ceases to be the owner of the copy; or
- (b) make a single reproduction for backup purposes of the copy or of a reproduced copy referred to in paragraph (a) if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the computer program.

General Concerns

1. In relation to the idea/expression dichotomy – software is designed to perform a function and if you say that at its narrowest you are only protecting the source code written by the developer, then copyright only extends in so far as the written code is actually copied;
2. In relation to undue restrictions on progress – as a matter of policy, if copyright protection is extended to non-literal copying for a duration of the author’s life plus fifty years, we may unduly restrict improvements and progress on that idea;
3. In relation to unacceptable distortions of copyright law – would the inclusion of software distort the bounds of copyright law? The challenge is to find a harmony between copyright law and software programming;
4. Why not use patent law? Why not sui generis protection? – The US Patent Act does not permit the patent of mathematical formulae and algorithms, which curtails any question about the patent-ability of software (this thought has changed today)

Copyright was deemed to be the most compatible form for protection, but it does not remain the ideal form. What is considered to be the underlying literary work in the software program? For example, in order to get software to work, the source code must be translated into object code, which no human being can read or understand. As such, where is the literary work and how far should copyright go in protecting some underlying literary work?

Issues of fixation also arise as the ephemeral quality of computer software results in the fact that the work is never fixed in any material form.

The evolution of case law on this subject arose in the US with a series of pivotal decisions from 1986-1992.

Apple Computer v. MacIntosh (1985) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Object code had been reverse-engineered and reproduced by the defendants ○ FCTD – defendant raises the US merger doctrine: expressly rejected by trial judge (SCC also expressly rejects the merger doctrine) 	<ul style="list-style-type: none"> ○ Issue: Whether you can have copyright in object code? ○ What does object code communicate if it is unreadable to humans? ○ Australian Ct in similar case held that something that cannot be communicated to a human being cannot be the subject of copyright protection 	<ul style="list-style-type: none"> ○ Both object code (in spite of the fact that it does not communicate anything to human beings) and source code may be the subject of copyright protection in Canada

Private property rights supersede *Charter* rights in the context of free speech and intellectual property. Do property rights trump free speech rights? Look at *Michelin* case. Copyright is about controlling expression. Great paper. It is emerging. It is unknown.

What about constructing some form of sui generis model for protection? Consider the *Integrated Circuit Topography Act* – the notion of creating this form of protection is very American. The US demanded that if other countries wished to trade integrated circuits with the US, then they would have to enact legislation protecting their design. The *Copyright Act* does not apply to topographies.

Whelan Associates Inc., v. Jaslow Dental Laboratory

Facts	Holding
<ul style="list-style-type: none"> ○ A program was developed to streamline the administrative work of a dental lab – accounting info, client management, etc., ○ Competing software was developed called DentCom, not a direct copy of DentalLab, but its purpose was also to streamline the operation of a dental lab ○ Differentiation – plaintiff argues the structure, sequence and organization of the files and subroutines were copied ○ As a result of working with the plaintiff, the defendant developed expertise in the software, which he hadn't had before ○ The person who commissioned the program to be made is attempting to stop the programmer from marketing his development 	<ul style="list-style-type: none"> ○ The structure, sequence, and organization of software would not necessarily be inevitably similar ○ This took copyright law away from literal copying and into the realm of the selection and arrangement of facts ○ 'Look and Feel' infringement?

We might understand that the expression of code placed on a piece of paper is a literary work, but what would constitute infringement of that literary work? If it is photocopied, it is infringed. This was the first case to look specifically at non-literal copying.

Literal Copying ←————→ Structure & Organization ←————→ ‘Look & Feel’ Copying

Lotus Development Corp v. Paperback Software Intern (1995) US SC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Whether there could be copyright in the menu commands? ○ The look and feel of the screen display was similar such that the plaintiff could successfully allege copyright infringement 	<ul style="list-style-type: none"> ○ Put to rest the notion that look and feel alone could support an action for copyright infringement

Computer Associates International Inc., v. Altai Inc., (1992) 2nd Circuit

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Review: not of import 	<ul style="list-style-type: none"> ○ Expressly rejected <i>Whelan</i> and established a Three Step Test: ○ Abstraction – identify all of the ideas of the software at a number of levels of abstraction; ○ Filtration – each component of the program should be examined and consider whether the feature is dictated by the function of the program. Look at whether the programmer has included a particular feature that was either the base idea or dictated by considerations of efficiency and necessarily incidental; and, ○ Comparison – the protectable expression are those elements that are left and should be compared with the elements of the plaintiff’s 	<ul style="list-style-type: none"> ○ You cannot claim copyright in every piece of software, the court will analyze the issue utilizing this three point test

Where do we go from here? Should we protect non-original electronic databases? What is the impact of the copyleft movement – open source software? This brings software back into a copyright construct as it sifts through and only protects what can be seen to be genuinely expression, rather than idea. A lot of the jurisprudence is overshadowed by subsequent developments.

Today, the possibility does exist to patent software. As long as you are talking about an invention, whether driven by a particular piece of software that passes the patent tests, there is no reason to exclude software-based invention from patent protection. This has been happening fairly regularly in the 1990s. A more recent development is a controversy over whether or not software should extend into business methods patents specifically – ways of doing business on the Internet that is run through software. Should these business processes form the basis of patent protection? The concern is always with stifling innovation – some sort of reward should be given to the invention of some novel or non-obvious product, but we want to allow burgeoning or new technology to develop. The nature of the software itself requires that developers build on the developments of the past. As such, software does not sit squarely with either copyright or patent law. The advantage in patents is the strength of the monopoly.

In 1998, the US courts said that business methods were properly subject of patent protection under the US Patent Act. This resulted in a flood of e-commerce organizations applying for patents in the US. Consider the ongoing controversy over business methods patents and how it will be resolved. This issue is very much alive – there is nothing in the Canadian Patent legislation that precludes this.

The other area of controversy is the non-original electronic database. Can they be sufficiently creative to enjoy some intellectual property protection? There has been a lot of discussion and debate as to whether some form of protection should be given to such databases. This is yet unresolved and remains hugely controversial because we do not know if we can find the appropriate balance.

Finally, the copyleft movement and notion of open-source code is another model that attempts to address the issue of conferring intellectual property rights in software. These individuals will not enforce their rights in any way that may stifle development as long as attributed to the original creator are some props and the developer also shares freely.

Dramatic, Musical and Artistic Works

1. Dramatic Works

Because copyright law is a statute largely designed around print technology, the jurisprudence in other areas is not as highly developed as it is for print.

‘Dramatic Works’ are defined in section 2 of the Copyright Act and: includes any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise

Considering that a dramatic work can be fixed in writing, how do we distinguish between a dramatic and literary work? We look to intention – a dramatic work is intended to be performed while a literary work is intended to be read and a musical work is intended to be played or sung.

Kantel v. Grant & Auld (1933) Exch Ct

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A children’s radio show, Uncle Bob’s Sunshine Club, featured a ventriloquist and dummy called Happy Harry ○ The defendant fired the creator and continued the show with a different host ○ Kantel attempted to assert copyright in the program 	<ul style="list-style-type: none"> ○ Defense argues that they have only taken the idea and not the expression of the idea ○ As long as the plaintiff’s idea is sufficiently fixed in some identifiable and conceptual framework, then it is sufficiently original to the plaintiff ○ The scripts or sketches that had been loosely constructed constituted a dramatic work because there was sufficient dramatic composition that could be performed 	<ul style="list-style-type: none"> ○ One may not copy the pre-determined elements of a dramatic work – doing so is taking more than just the idea

How do we deal with television programs within this context?

Hutton v. Canadian Broadcasting Corporation (1989) Alta QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Related to one of the first rock video shows produced by the CBC ○ Plaintiff co-produced a show called ‘Star-Chart’ running for 19 episodes before being cancelled ○ Three years later another rock video show, ‘Good Rocking Tonight’ was developed ○ The new show had a segment called ‘Music Central’ with a host and two female assistants who would go through the top ten videos 	<ul style="list-style-type: none"> ○ The court looks at the idea of idea and expression ○ CBC asks why it should be precluded from producing a rock video show ○ The court asked what is it that is original about producing a rock video show? ○ The ‘Music Central’ scene contained original dramatic elements through which copyright could vest ○ The plaintiff’s program was just merely a series of rock videos – there was no act of assessing or ranking the videos 	<ul style="list-style-type: none"> ○ The defendants simply copied the idea of a music video program and they are free to do that.

Dance – are notations of a dance sufficient to fix the work for the purposes of copyright protection? A choreographic is sufficiently fixed through notation and definitely fixed if captured through video.

Horgan v. MacMillan (1986) 2nd Circ.

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Is there copyright infringement in a work of choreography by a person taking still photographs of the dance? 	<ul style="list-style-type: none"> ○ The district court held that a still photograph does not capture the dramatic work because it does not capture the movement ○ The district court applied the wrong legal standard 	<ul style="list-style-type: none"> ○ Still photographs do not capture dramatic works – does not capture movement

Whenever you think about the copyright issues, you always have to go back to the four fundamentals. Always analyze what the underlying work is and with whom the right might vest from the beginning.

2. Musical Works

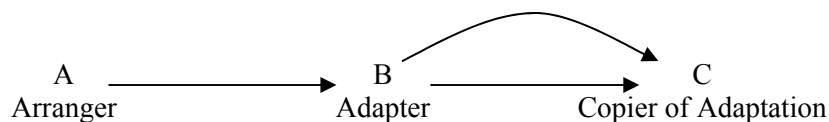
‘Musical Work’ – any work of music or musical composition, with or without words, and includes any compilation thereof.

The problems that arose were in relation to the adaptation of particular music from one instrument or set of instruments to another. How do we deal with musical adaptations?

Wood v. Boosey (1868) QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The music for an opera was adapted to a piano 	<ul style="list-style-type: none"> ○ Did the adaptation’s copyright vest with the adapter or composer of the opera? ○ Is an adaptation akin with a translation such that anyone that adapted it was making the adaptation for the composer of the opera? 	<ul style="list-style-type: none"> ○ The arranger, the person who adapts, has a separate copyright in the arrangement

However, the problem arises of what happens if the person who adapts the opera for the piano does not have the permission of the composer. Does the fact that you infringe someone else’s copyright disentitle you to your own copyright rights in an adaptation? The prevailing view is that even without permission you still have copyright in the work subject to the liabilities of the infringement.



B, in his or her infringement, is obligated to account for the benefits s/he may accrue and then pass them back to the original copyright holder. B has only the limited right to enjoin others from infringing.

Redwood Music Ltd. v. Chappell & Co. (1982) RPC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A hit was produced and a number of arrangements of the piece were made 	<ul style="list-style-type: none"> ○ The arrangements are sufficiently original so they vest copyright in the arranger, but in dealing with the issue of those works that were adapted without the permission of A, the court held that B can restrain the publication of the infringing works, but because B is an infringer, B cannot reap any benefits from the arrangements 	<ul style="list-style-type: none"> ○ The copyright is not as full as it would have been had they gotten permission

A compulsory license provision came up in the following case:

ATV Music Publishing of Canada v. Rogers Radio Broadcasting (1982) ON HC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The Beatles song Revolution was reworked in Canada with a theme of ‘Constitution’ 	<ul style="list-style-type: none"> ○ Is a song a musical work in and of itself or is it two separate works: literary work and musical work? ○ Someone may record a musical work without the permission of the copyright holder in that work so long as the proper royalty is paid ○ As long as The Beatles had recorded the work in Canada, so long as someone else recorded in Canada they could do so without prior permission if they paid the royalty 	<ul style="list-style-type: none"> ○ A musical recording may be reproduced without permission so long as the proper pre-established royalty is made

Section 19 – you can make a record of the work as long as the work has been recorded before.

The question is what the work is: a combination of words and music? Once you change the words you are producing some alteration. If, on the other hand, a song is two separate copyright works (literary and musical), then the melody has been duplicated precisely and one can claim the benefit of Section 19. Thus, questions of what a song is came to the courts for a number of reasons.

3. Artistic Works

‘Artistic Works’ are many and varied – they are defined in section 2. Paintings, drawings, maps, charts, and etc.,

Kenrick & Co. v. Lawrence & Co. (1890) QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A drawing of a hand holding a pencil was used to inform potential illiterate voters what to do in the 	<ul style="list-style-type: none"> ○ The plaintiff would have copyright in the drawing, but only the precise drawing that the plaintiff made 	<ul style="list-style-type: none"> ○ It must be nothing short of an exact literal copying of the drawing registered – there is

booth	○ Merely to draw another hand holding a pencil would not constitute copyright infringement	nothing else that is not the interest of the entire world
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Gentieu v. John Muller & Co. Inc., (1989)

Facts	Holding
<ul style="list-style-type: none"> ○ Designs for fabric was intended to be used for chairs and other upholstery ○ Should the designs be given copyright protection? 	<ul style="list-style-type: none"> ○ The boundary between and artistic work that benefits from copyright versus the design of fabric that benefits from industrial design is not clear

Industrial Design Act – targets the aesthetically pleasing elements of a functional object. Something that gives a functional work eye appeal is protected by Industrial Design law. The Industrial Design Act is very limited in terms of the duration of protection – anyone who has the design of an article with eye appeal would seek Copyright protection over Design protection. Design protection requires registration for the right to vest. Also, Industrial Design Law requires a novelty of the aesthetic design.

George Hensher Ltd. v. Restawile Upholstery Ltd (1975) HL

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Was the prototype of a new chair a work of artistic craftsmanship as per the Copyright Act? ○ Plaintiff developed the design of a chair and the defendant copied the design of the chair 	<ul style="list-style-type: none"> ○ Court grapples what a work of artistic craftsmanship includes ○ The prototype was not a work of artistic craftsmanship – the intent of the manufacturer was to produce a chair the public would wish to buy ○ Once it becomes a product for manufacture, but it does not have sufficient artistic merit to be protected as such, it will be very difficult to find copyright protection under the Statute 	<ul style="list-style-type: none"> ○ The court must consider whether the object in question as the requisite artistic components to be considered as such for the purpose of Copyright

Ownership of Copyright

Pursuant to section 13(1) the author of a work shall be the first owner of the copyright therein. It is very important to be able to characterize, then, who the author is.

In the late 1970s, Michel Foucault wrote an article concerning, “What is an Author”. This article deconstructed the concept of author and looked at it through a lens that suggested that our cultural understanding of what an author is is merely a social or cultural construct. Once you start to look at author in this way, it is not necessarily attached to the notion of an individual who has created something that nobody else has ever created. A flurry of writing suggested that the only way that we can tolerate the way we commonly understand the author is through this creative genius – we must ensure that on the opposite side we have a robust public domain. The notion of giving or sharing is just as important as giving incentive to the creator of the work. If we say that the author controls every aspect of human endeavor, then we must be very clear as to who is the author. The idea is to restrict the definition of author so as to permit a robust public domain.



Foucault critiques the construct of an author as an individual – extolling the creative genius that can vest in the individual and then give rights to the individual over the product. Foucault flips the notion of authorship. The author is a construct that is created within a social institutional structure that needs to rely on that structure in order to perpetuate – the structure here is the juridical system. Foucault challenges that notion that it is inevitable that we need to vest rights in someone that we call the author. However, in order to continue to promote the system, we need to define that notion of ‘author’ in a particular way. We are resting within the person characteristics that are antithetical to our natural structures by diminishing the individual act of creative expression.

In the 18th and 19th century there was a sense in Western thought that there was some virtue in creating. The idea that we have rights as individuals brought about a system of copyright law where one would think that we have rights as individuals. Foucault challenges the underlying assumptions and asks that we acknowledge that these assumptions are not based on any natural law. Where do we go from here?

Foucault suggests that as society changes that although the author has played the role of the regulator of the fictive, given historical modifications taking place it does not seem necessary that the author function remain in existence. Foucault thinks that the author function will disappear and fiction and text will continue in another mode. As society changes, because the concept of author will change, we will still need a construct with which we control the text, but it might not necessarily be the author. Ask the following:

1. What are the modes of discourse?
2. Who can assume a subject function?
3. What difference does it make who is speaking?

OLGA – Online Guitar Archive

It challenges a view of copyright. Fairly popular songs are posted with tablatures. The tablature is offered by the constructor of the site to show the public how to play it. Should one be entitled to do this?

Copyright is designed on the one hand to vest in authors, but the purpose is for the public good. The public good means that everything that you can do without getting permission from the author. Even the author’s rights systems have permitted uses.

US – posting a link on the website is an infringement of a public display right. Only the author has the right to publicly display his or her own work. Posting a link is a public display of the work.

Entitlement to Protection

Cummins v. Bond (1927) ER

Facts	Holding
<ul style="list-style-type: none"> ○ Individual claimed authorship in a work of another who has been dead for centuries ○ It is alleged that Cummins wrote the work while in a trance – she transcribed what a spirit told her ○ Dispute arises as the defendant feels, that by providing the editorial input, he became a joint author – defendant claims the three of them were authors of the work 	<ul style="list-style-type: none"> ○ This is too far outside the realm of what we understand by the concept of author ○ I think I ought to confine myself when inquiring who is the author to individuals who were alive when the work first came into existence and to conditions that the legislature in 1911 may reasonably be presumed to have contemplated

Neudorf v. Netterk Productions Ltd

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff was a musician and contacted by the McLachlan camp to aid in the production of the sound recording ○ Plaintiff was to suggest ways in which songs could be improved ○ Plaintiff steered and managed her through the creative process ○ Plaintiff claims that he became the joint-author of four particular songs 	<ul style="list-style-type: none"> ○ Test for joint authorship: ○ Whether the plaintiff contributed significant original expression; ○ Did the parties intend for their contributions to be merged into a unitary whole; and, ○ Did each intend the other to be a joint author of the work? ○ There was no intent that they be joint-authors – no intent to share in the proprietary interest 	<ul style="list-style-type: none"> ○ Test for Joint Authorship: <ol style="list-style-type: none"> 1. Significant contribution to the expression; 2. An intention to merge the contributions between the parties; and, 3. An intention of both to be a joint author with the other

Intention is a factor to consider when looking at whether two people co-authored a work. It becomes part and parcel to the question of whether there was co-authorship.

There is a lot of discussion regarding how the plaintiff and the defendant work together. The law needs to draw a line. Sara McLachlan was clear in her testimony that she never understood that this fellow was helping develop the songs. What would it have taken for him to be a joint-author?

An author has to be someone who is alive at the time the work is created. An author has to be someone who contributes more than mere ideas or suggestions.

Exceptions to Authorship

13(3) – when made in the course of employment, the employer is the owner of the copyright.

In this context, one would need to show that the work was created in the course of particular employment. The proprietary right vests with the employer who did nothing.

Copyright is not a reflection of natural or universal principles, but rather a compilation of various rules that satisfy a set of policy objectives that satisfy the statute at the time of enactment.

Hawley v. Canada 30 CPR (FCTD)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Hawley was an inmate in our penal system – in the penal system each inmate is required to undertake some work ○ Hawley was an artist who painted a mural in the penitentiary ○ He was first engaged as a painter and then recommended a mural – he requested that he make a painting on the wall ○ While out of jail, the former inmate wanted to ensure that he is entitled to appropriate and put into his portfolio the mural he made while in jail 	<ul style="list-style-type: none"> ○ The painting was done as part of his required gainful employment ○ The purchase of supplies and materials was consistent with the carrying out of the assignments to do the work on behalf of the institution 	<ul style="list-style-type: none"> ○ Works created in the course of employment belong to the employer

Photographs

13(2) – Photographs – where the original was ordered by some other person and made for valuable consideration, the person by whom the original was ordered is the owner of the copyright.

Paul Couvrette Photographs v. The Ottawa Citizen (1986) ON Gen Div

Facts	Holding
<ul style="list-style-type: none"> ○ Photographer took photos of some model – model allowed photographer to use the photos for his portfolio ○ Model wanted to use the photos in a particular way – the plaintiff challenged this 	<ul style="list-style-type: none"> ○ The model commissioned the photographer – the publisher, then, needed only her permission and not the photographer’s ○ Consideration was the modeling fee that she would have claimed, but did not – the defendant had properly used the photo with the model’s consent (who by paying valuable consideration had acquired the copyright) and was not required to obtain the plaintiff’s consent as well

Gould Estate v. Stoddart Publishing

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Included within a book was a series of photographs taken ○ Gould did not commission those photographs – while interviewing Gould, plaintiff took photos of him and had enough to produce it in book form ○ Estate of Gould objected as the photos were not commissioned by Gould 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Was the author able to commercially exploit the photos and other interview material to write subsequent articles without Gould’s permission? ○ The author was the owner of all the photos taken as well as the related text and captions ○ Gould, as the <i>subject</i> of the photos and written materials had no proprietary interest 	<ul style="list-style-type: none"> ○ The <i>subject</i> of a work does not, prima facie, have a proprietary interest in the work

Copyright Act 13(4) – Assignment and licenses

The owner of the copyright can 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 license, but no assignment or grant is valid unless it is in writing.

A license does not transfer any title, but only grants permission to the licensee to disseminate (or do whatever is set out in the license – the simple right to publish, for example).

The copyright holder has a host of ways that s/he can exploit the copyright interest. Traditionally, the author has given over (assigned) his/her own rights to the publisher to disseminate the work. For example, a publishing agreement for a novel or film might include a provision giving over every manifestation that can be made of the work to the publisher. This occurs quite frequently in the recording industry – the artist might be entitled to 1% of the royalties and the remaining rights are given over to the publisher.

Ultimately the control vests with the copyright holder – often in circumstances where we are dealing with the author that is not established, we are seeing dealing with unequal bargaining power.

Crown Copyright – Statutes and Judgments

Copyright Act 12 – Where copyright belongs to her Majesty

Crown copyright will last for 50 years from the date of the first publication of the work. Even where there is an author of the Crown work, the term will last only 50 years from the date of publication.

Crown copyright involves things like government prepared reports, statutes, court judgments etc., This section does not restrict the ability to assert copyright only to the federal crown, but also extends to the provincial crown.

What do you do about judgments and statutes? How can we justify the limitation on access to laws? Giving copyright in judgments permits the Crown control to not provide or restrict access by the public to the works. The argument that is statutorily entrenched in the US is that the government should not be able to usurp such rights – it is public domain material. This was a really lively debate about whether or not, where you have jurisdictions such as Canada, where there is a section 12 that gives the Crown an interest, is it appropriate for the Crown to assert such rights or should they just waive that right?

Our initial reaction is that they should just waive the right. Why would the Crown view it any differently? The arguments that were made initially in wanting to retain the interest and, which, mirrors arguments made internationally, relate to quality control. Law reporters are licensed to record judicial decisions worthy of note – these people are under a standard of care that is very high. As such, we can ensure that only those that meet a certain standard will be published. Some of the provincial governments were arguing that they should assert copyright so that the judgments and statutes are not freely available to all.

The federal government took a different approach in the late 1990s. The *Reproduction of Federal Law Order* – <http://canada.justice.gc.ca> - this grants free license for copying federal law. The federal government chooses not to assert their right regarding federal statutes, judicial decisions, and etc.,

They were speaking of this mostly in the context of print publications and publishing judgments through law reports. The Internet and the notion of open government have rendered these issues mostly moot. For the purposes of the notion that the law should be freely available to everyone that is subject to it – the

Internet has really alleviated most of the problems. The federal order says that it is of fundamental importance that its law be widely known and citizens have unimpeded access to that law.

Thus, any crown work is subject to the Copyright Act. Judicial decisions and statutes would be subject to the Crown Copyright provision, but for the federal waiver in the federal order.

Duration of Copyright

At the Berne Convention a number of entities established that copyright should last for a term of the life of the author plus 50 years. This is seen in our Copyright Act at section 6 – Term of copyright: The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar.

Section 6-12 deal with the term of Copyright, but there are some exceptions.

The copyright act will distinguish between legal beings and natural beings. Only natural people may enjoy life plus fifty years.

Eldred v. Ashcroft

Article One section 8(8) – the fundamental purpose of copyright law is to promote the useful arts. It is to provide the incentive that is necessary to ensure that society progresses and evolves. When you take this approach what you are saying is that you are only going to award copyright only to the extent that an incentive to create is required.

Infringement

What will the person who has copyright in a work be protected from? We turn to copyright infringement.

Copyright Act 3 – Copyright in Works

Copyright Act 27(1) – Infringement in Copyright – It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do (which is set out by section 3 acts).

Primary Infringement

This includes either doing the acts or authorizing a third party to do any of the section 3 acts. Only the copyright owner, for instance, has the right to publish or authorize the publishing of the work. As such, primary infringement involves committing any of the section 3 acts without permission or authorizing a third party to commit a section 3 act without said permission.

One of the most fundamental copyright rights is the sole right to reproduce the work in any material form whatsoever. In order to infringe, you are not restricted to merely copying the work in the same medium. For example, taking a design drawing and making a three dimensional model would also be infringing because the drawing is being reproduced in another material form. As such, it is a very broad set of circumstances that would be caught under section three. Further, only a substantial part of the work need be copied for an infringement – the entire work, a book for instance, need not be copied.

One would need to show that the portion taken is the most significant portion of the work. Recall, the court will start with the premise that what is worth copying is also worth protecting. As such, if there is an identifiable passage that has been copied it might be considered to be a ‘significant portion’ holding the individual liable for such infringement. It is not quantity that counts, but rather quality. What you have to show in an infringement action is that the defendant copied. Any defense that there was no copying would require an assertion that the work was arrived at independently or the taking of public elements that the plaintiff him or herself took as well.

Secondary Infringement

One is a secondary infringer because s/he has handled in some way some of the infringed works. Copyright Act 27(2) – Secondary Infringement – catches anyone on the distribution chain after it has left the primary infringers hands.

The first discussion of copyright infringement in songs originated in the following case:

Francis Day & Hunter v. Bron (1963) All ER

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff had copyright in a song called, “In a Little Spanish Town” ○ The plaintiff’s and defendant’s song had a different beat ○ When the two songs were played, 8 bars in particular, which constituted the main theme of the plaintiff’s song, were heard in the defendant’s song 	<ul style="list-style-type: none"> ○ There is a possibility that a defendant will undertake subconscious copying ○ The court did not ask for expert opinion, but took it on faith because it works for the copyright structure – it revolves the problem where there are two songs that are substantially similar 	<ul style="list-style-type: none"> ○ When it comes to copying of musical works, the court may find in favour of the plaintiff holding that the defendant undertook a subconscious copying of the song ○ Musical works might be copied subconsciously

<ul style="list-style-type: none"> ○ Defendant denies having heard the song ○ The songs were, in fact, produced a while apart 	<ul style="list-style-type: none"> ○ The courts presume that it is a frailty of the human mind that we all absorb music without necessarily being able to know its source ○ The court is willing to presume that the defendant must have heard the song, it must have remained embedded in his mind, and he later produced it unwittingly – this drastically reduces the burden of proof 	<ul style="list-style-type: none"> ○ Where a defendant creates a similar work, the defendant would be liable for subconscious copying if the plaintiff shows that the defendant was familiar with the work and had ‘access’ to the work
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The defendant would be liable for subconscious copying if the plaintiff shows that the defendant was familiar with the work – the defendant had ‘access’ to the work and the resulting work was similar. What do we mean by ‘access’? The plaintiff would have to show that the defendant was in a place where the defendant would have a good chance of actually hearing the music.

The term reproducing is more benign than copying. Copying connotes some mental element while reproduction may extend to the subconscious act of infringement.

Vaughn v. Warner Communications (1986) ON HC

Facts	Holding
<ul style="list-style-type: none"> ○ Plaintiff owned the trademark in “A Member of the Family of Gremlins” and produced clay figurines called Gremlins ○ The defendant distributed a motion picture called ‘Gremlins’ about gremlin-like creatures as characters 	<ul style="list-style-type: none"> ○ There was no similarity either in texture or appearance between the figurines and movie characters ○ Damage could not be made out as the defendant’s business actually increased after the movie was released

Gondos v. Hardy (1977)

Facts	Holding
<ul style="list-style-type: none"> ○ “The Homecoming” was written by Hardy ○ Plaintiff claims that he composed a song and “The Homecoming” infringes this piece of music ○ The two pieces sound substantially similar ○ The plaintiff need only show that the defendant had ‘access’ to the plaintiff’s work ○ The plaintiff played regularly in a piano bar in a Toronto hotel and on one particular occasion Hardy walked in – Hardy was present in a place where Gondos was performing the piece of music in question 	<ul style="list-style-type: none"> ○ The plaintiff could not establish ‘access’ – the plaintiff’s piece was not widely disseminated in Canada ○ ‘Access’ in this case depends largely upon the credibility of the witnesses ○ The court did not believe the plaintiff and discredited many of his witnesses ○ Defendant also rebutted the presumption of copying by producing eleven different pieces that sounded strikingly similar to both the defendant’s and plaintiff’s piece of music – this shows that the series of bars might be in the public domain and neither piece really originated with the plaintiff, but rather our musical history ○ Because there were so many similarities, it could have been taken from another piece – this type of evidence satisfied the defendant’s burden

There are ways of rebutting the subconscious copying argument, but it rests on factual grounds – the determination that the witnesses testimony was not credible.

Abkco Music Inc., v. Harrisongs Music Ltd (1983) 2nd Circ

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The Harrison song was significantly similar to the Ronald Mack composition ○ Harrison maintains he had never heard the song 	<ul style="list-style-type: none"> ○ On the ‘access’ issue, Harrison admitted that he had heard the plaintiff’s song in the 1960s ○ The song was proven to be popular and widely disseminated 	<ul style="list-style-type: none"> ○ Findings of substantial similarity and access are sufficient evidence to found an action of copyright infringement

Authorizing an Infringement

It is not enough to defend yourself in court to say that you were not the person who photocopied the textbook, but rather another did. As long as you authorize another to infringe, you yourself may be held to have infringed.

What about manufacturers of devices that permit copyright infringement? Can you sue Xerox for creating devices that permit others to infringe copyright? Generally speaking, the Anglo-Canadian world has said no. Authorizing infringement, to the courts means, being actively involved in the infringement itself. The individual must do more than merely manufacture the machine – one must explicitly acknowledge that this is the use to which the work will be put.

Moorhouse v. University of New South Wales (1975) HC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A photocopier was put in a University library ○ Moorhouse found someone copying a substantial part of his work ○ Moorhouse brings this action against the University for authorizing copyright infringement 	<ul style="list-style-type: none"> ○ Someone, like the University, who has under its control the means by which copyright infringement can occur and to make that means available to people having reason to suspect it might be used for infringement and omitting to take reasonable steps to limit the use of the device to legitimate purposes (infringement) might be liable itself to copyright infringement 	<ul style="list-style-type: none"> ○ One who makes available the means of copyright infringement might be held liable if reasonable steps are not taken to limit the use of the device to legitimate purposes (in-house context)

What are reasonable steps to limit copying to reasonable purposes – putting up a sign. All the university needs to do to not authorize copyright infringement is to put up a sign expressing what may be copied under their CanCopy copyright license.

CBS Inc., v. Ames Records & Tapes (1981) WLR

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Ames had a record holding business where people could rent audio recordings for personal use ○ CBS sues defendant wanting to shut them down arguing that the mere fact of running the agency authorizes an infringement of copyright 	<ul style="list-style-type: none"> ○ The defendant did not authorize an infringement because it did not provide the equipment or facilities to copy ○ The fact that the defendants were indifferent, did not amount to authorization 	<ul style="list-style-type: none"> ○ You need to take some active approach/participation even though you are not the person infringing

RCA v. Fairfax (Aust)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Defendant published an article saying that if people do not want to buy an album they can look at home taping 	<ul style="list-style-type: none"> ○ The mere fact of writing an article that suggests that you can infringe copyright is not authorizing an infringement because the defendant had no control – there must be some direct control relationship opportunity 	<ul style="list-style-type: none"> ○ There must be some direct relationship or control in order to found an action for authorizing copyright infringement

CBS Songs Ltd. v. Amstad Consumer Electronics (1988) HL

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Defendant manufactured tape to tape cassette players ○ The packaging said that the cassette could be used to ‘tape your favorite cassette’ 	<ul style="list-style-type: none"> ○ The defendants were not liable as the requisite control relationship did not exist 	<ul style="list-style-type: none"> ○ Merely providing the means for possible infringement does not meet the burden for founding an action for the authorization of copyright infringement

One of the factors that the courts were mindful of is that all of the equipment could be used for non-infringing purposes. These technologies were not designed exclusively to infringe copyright. This is important because you do not want to stop the development of useful consumer good when they can be used for non-infringing purposes.

Georges de Tervagne v. Town of Beloeil (1993) Gen Div

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A local theatre troop was allowed to perform a play ○ The troop never thought that it needed permission from the playwright to perform the play ○ The town authorized the troop to perform the play in a hall ○ The playwright is now bringing an action against the town for authorizing an infringement 	<ul style="list-style-type: none"> ○ You cannot attach liability to the town for authorizing the infringement because they had no control over whether or not the troop had gotten the proper approvals or permissions ○ The mere fact that the town rented the hall, which made possible the infringement, does not support the finding that they authorized the performance of a play that infringed copyright 	<ul style="list-style-type: none"> ○ An element of control must be shown before liability may be attached for the authorization of infringement

As long as the defendant can prove that it had no control and took reasonable steps to avoid, then liability will not attach with the defendant.

Tariff 22

The first question that was looked at was whether or not posting music on the Internet amounted to transmitting the work by telecommunication. The nature of the Internet, which deals with packet switching, is simply packet-switching and not communicating the work. Moreover, it is not communication of the public, but really as between the server and the individual. The copyright board held that this was still transmission by telecommunication. The fact that it relies on packet-switching does not preclude the work from being ‘communicated’. The notion of communicating to the public is broader than communicating to a public audience. As long as the public at large can have access to the work, that

is sufficient for this particular requirement. The definition of telecommunication under the Act is broad enough to include Internet communication.

Therefore, a musical work that is put on the Internet is a communication of the work to the public by telecommunication. However, it is only communicated at the point in which the end user asks for the work. The fact of putting the musical work on the server, while not the primary act of communicating, is authorizing a communication to the public. Anyone who puts a song on a server so that others may access it through the Internet is authorizing a communication. Once someone accesses the work, asks the server to transmit, there has been a communication of the work to the public by telecommunication. This becomes important when you think about the two separate acts that are potentially infringing:

1. Communicating the work; or,
2. Authorizing the communication of the work

Who would be liable to the copyright holder of these two infringers? Should ISPs be liable? ISPs that merely act as the agents of transmission – a conduit that provides the facilities will not be liable, but rather the individual that posts the content on the server that will be liable. Because the Copyright Act is bound by the territorial jurisdiction of Canada, we are talking about a person who puts the work on a server in Canada. Our Act will not catch anyone who downloads music from a server outside of Canada.

Permitted Acts and Defenses

There are two competing underlying perspective to copyright law:

1. Protect the author's
2. Protect the public

What the statute is trying to do is achieve a balance that is ultimately for the public good in order to carve out incentives.

The US construction of copyright has more to do with the equal balance between the author's rights and the public interest. In Canada, we do not have the same focus. It appears that we are moving towards the author-centric model where any exceptions are very specific and narrow and directed squarely on the 'over-riding good' that we want to promote.

Fair Dealing

A substantial part may be reproduced if it is dealt with fairly under the terms of the statutes (*Copyright Act* section 29). Fair dealing only means doing four things with the work:

1. Research;
2. Private Study;
3. Criticism or Review; and,
4. New Reporting

Copyright Act 29.1 and 29.2 has some specific requirements if fair dealing is going to be claimed – the source must be identified and attributed.

The same requirement does not avail in relation to research and private study, which is generally interpreted as a private act. In other words, criticism and new reporting is generally understood for public/commercial means, while research and study are considered private acts. The courts restrictively construe these sections. For example, the courts have interpreted each of the heads.

Zamacois v. Douville and Marchand (1943)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff wrote a number of articles for a newspaper and in the article the journalist included an entire excerpt of the plaintiff's work ○ The journalist was recommending the plaintiff's work 	<ul style="list-style-type: none"> ○ Issue: Could the reproduction of an entire work constitute fair dealing? ○ Why would one go and seek the plaintiff's work and pay the proper royalty if the entire work is available with the critique, this should not be allowed 	<ul style="list-style-type: none"> ○ Fair dealing, for the purpose of criticism or review, does not permit you to reproduce the entire piece

Tom Hopkins International v. Wall & Redekop (1983) BCSC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A video regarding real estate sales was bought by the defendant and then copied for repeated use in various offices 	<ul style="list-style-type: none"> ○ Fair dealing does not extend to the preparation of a number of copies of an entire set and distribution for possible repeated use in branch offices ○ The courts are extremely strict in their interpretation of the provision 	<ul style="list-style-type: none"> ○ Fair dealing might permit a partial copy for limited viewing on the basis of a time-shifting argument

The Queen v. Lorimer (1982) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Federal government issued a 7 volume report on the Canadian Petroleum Industry ○ The defendant, a book publisher, produced a summary of the work without permission ○ Defendant published a condensed version of the report for public sale and it sold fairly well ○ Crown proceeds for infringement ○ Defendant argues that it is fair dealing for the purposes of review ○ Defendant raised a free speech argument and a public interest argument 	<ul style="list-style-type: none"> ○ Issue: Is it fair dealing to make a condensed version of a copyrighted work? ○ The defendant in now way added his own commentary – he just condensed the very lengthy report into a reader-friendly length ○ An abridgment does not fall within the concept of fair dealing ○ Issue: Should a ‘free speech’ right trump the copyright issue? ○ The courts are not paying attention to the possibility of the defense of free speech ○ Issue: Was the defendant’s action properly within the public interest? ○ There could be a public interest defense in copyright, but this was not the right sort of case – the defense is invoke, generally, because you are wishing to disclose something that has not been made public 	<ul style="list-style-type: none"> ○ An abridgment does not fall within the concept of fair dealing ○ Our courts are reticent to apply a free speech defense in intellectual property cases

Allen v. Toronto Star Newspapers (1997) ON Gen Div

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Allen was commissioned to take a photo of Sheila Copps dressed in leather astride a motorcycle for the cover of Saturday Night ○ The Toronto Star, which was doing a piece on Sheila Copps, reproduced that particular magazine cover in its paper ○ The photographer objected ○ Toronto Star argued that it was fair dealing for the purposes of news reporting ○ Plaintiff argues that you cannot have fair dealing if you have reproduced the entire work 	<ul style="list-style-type: none"> ○ The court does not believe that Zamacois stood for a broad principle – the test of fair dealing is purposive: it is possible to raise the defense even where the entire work has been reproduced ○ One is not precluded from raising fair dealing where the entire work is reproduced ○ Note: This case was dealing with a previous provision that did not require attribution ○ Note: Who owned the copyright to the cover? What was the relationship between Allen and Saturday Night? 	<ul style="list-style-type: none"> ○ Fair dealing is a question of degree, but it must be restrictively construed – a qualitative assessment ○ Always make sure that the parties properly have the standing to pursue a claim for infringement ○ Fair dealing is purposive and is not a mechanical test for measurement for the extent of copying involved

Boudreau v. Lin et al (1993) ON Gen Div

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A part-time MBA student wrote a major paper worked for a high-tech company – wrote about integrated circuits as part of an independent research study ○ The professor mentioned that the student should consider publishing ○ Student finds out months later that the paper is published, forms part 	<ul style="list-style-type: none"> ○ It was not realistic to think that the professor could have done all of the things that he purported to do considering that the paper was based on the expertise and ideas of the student – this was found out at cross-examination ○ The professor did not understand enough about the nature of the 	<ul style="list-style-type: none"> ○ The appropriation of the author’s work is certainly not fair dealing ○ The distribution of material to all the members of a class of students cannot be considered ‘private study’ ○ It is the duty of the University to set policies for the conduct of its policies for the conduct of its

<p>of a casebook, and his professor's name is on it with another professor at Michigan</p> <ul style="list-style-type: none"> ○ Dean investigates and learns that the omission of the student's name was a slip – he blames his assistant ○ The professor was coming up for promotion within the stream and he included this particular paper where he claimed that he was the principal researcher, he collected the data, and he finished the paper ○ Dean concludes that it was an unfortunate error committed by the professor 	<p>business itself</p> <ul style="list-style-type: none"> ○ It was clear to the court that the plaintiff was the sole author – editorial commentary is not enough to give you a piece of authorship ○ There has been a clear infringement of copyright in publishing the work without permission ○ Issue: Could the defendant assert fair dealing for the purposes of criticism or review? ○ The exception are to be restrictively interpreted ○ Professor Lim actively removed the plaintiff's name and inserted his own 	<p>employees and to accept responsibility for monitoring, or failing to monitor, the strict observation of these policies and of copyright laws</p>
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Fair Use (US)

The Canadian concept of fair dealing must be contrasted with the American idea of Fair Use. The US, which takes a much more balanced approach to copyright, takes a fair use defensive that is drafted in a non-restrictive way. The American Fair Use defense includes purposes such as criticism, comment, news reporting, teaching, scholarship, or research. This list is not exhaustive. The factors to be considered are:

1. The purpose and character of the use;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used; and,
4. The effect of the use.

Sony Corporation of America v. Universal City Studios (1984) US SC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Sony is being sued for the sale of VCRs – the copyright holders in movies and TV programs are suing Sony because VCRs allow the reproduction of copyrighted works without the permission of copyright holders 	<ul style="list-style-type: none"> ○ Some use of the VCR constituted fair use – not every use of the VCR is infringing and most of the time when people taped a program they did it because they were unavailable to view when it was broadcast (time-shifting) ○ If what you are doing is to tape it to view it at a later time, that is a reasonable expectation – the use is legitimate and fair 	<ul style="list-style-type: none"> ○ Reproducing for the purposes of time-shifting is fair use under US law

This concept of 'time-shifting' has been translated into the modern concept of 'space-shifting'. Why should 'space-shifting', the notion of downloading an audio file to an MP3 player for instance, be any different? In Canada, we have no provision to cover this type of use involving 'space-shifting' or 'time-shifting'.

Copyright Revisions

Copyright Act section 29.4 – it is not an infringement of copyright for an educational institution to make a manual reproduction of work on a dry-erase board or an overhead device etc.,

Copyright Act section 30.2 – Definition of library and what it can do

Parody

A significant difference between the provisions is in relation to whether or not parody is copyright infringement. Parody is often done to criticize that which is being reproduced. However, in order to do a successful parody a substantial portion of the underlying work must be reproduced. Does the artist creating the parody have to get the permission of the underlying work?

Parody in the US is a fair use of a copyright work while in Canada it is not.

Michelin-Michelin & Cie v. CAW-Canada (1996) FCTD

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A number of placards used in protest (strike) contained the Michelin Man ○ CAW argues that they should be permitted to reproduce the Michelin Man on a number of grounds: ○ Fair Dealing – Parody as a form of criticism ○ Freedom of Expression 	<ul style="list-style-type: none"> ○ Criticism in the Canadian context can only be invoked if attributed ○ Issue: Does parody fall within the head of criticism, which could trigger a fair dealing defense ○ If parliament had wanted to exempt parody as a new exception under the fair dealing provision, it would have done so – the public is precluded from using parody as a form of dissent because the public will always fall foul of copyright obligations 	<ul style="list-style-type: none"> ○ Consider the sales versus subject dichotomy: ○ <i>Sales</i> – the work is used to facilitate the expression of a particular point ancillary to what the work itself stands for ○ <i>Subject</i> – the work itself is the subject of the expression ○ A work as the <i>subject</i> of an expression may be properly saved by the fair dealing defense – although, we have yet to see a parody defense applied as such

Note: This case is harshly criticized on free speech grounds. There is no way, under the construction of our Copyright statute, to allow for parody as such.

There might be a subject distinction in the case of parody – the problem with *Michelin* is that the Michelin Man itself, the subject of the copyright infringement, was not be criticized directly. Instead, the Michelin Man was being use as a vehicle to criticize some other subject.

Digital Copyright – Jessica Littman

Introduction

Networked technology has changed the way many people go about research. As a result, curiosity and related thoughts are affected by the changes – networked technology provides an easily accessible vehicle for the retention of information. This, however, poses a problem, as we should think about the information that we consume. For example, we might have to think differently as to what an authoritative source is (what counts as authoritative and up-to-date in the Internet context?). We might accept that ‘someone else’ knows the answer, but in the Internet context we have to be very concerned with whom that ‘someone else’ is.

Tangible Reference Items versus Internet Research – the Internet beats general reference in a number of areas: speed, scope, and accuracy. The ability to run mere ‘string’ searches and to conduct ‘treeing’ methods sets the Internet far ahead of traditional reference material.

Traditional Error Correction – the traditional argument for traditional reference is the error checking involved before publication. One should note, however, that there are many willing volunteers that notify the author of inaccuracies. Moreover, the ease with which errors can be corrected surpasses that of traditional print media. Also, it is not accurate to say that there are less errors in print media – there is a fair share. Should we leave and rely on volunteer error correction in the information space.

Historical Context

The rate at which the Internet has been adopted is astonishing. Only 10 years ago it was questionable as to which direction the Internet would go and how it would be delivered to the consumer. A number of misconceptions existed as to who could access what we now know as the Internet.

Nobody owns the information space that we are talking about. It is not easy to enjoin an individual from accessing the information, taking it, and combining it with other information. The biggest difference, though, has to do with the magnitude of accessibility to Internet space opposed to physical space. This is the crux of the problem for Copyright Holders.

The US has taken on extravagant measures designed to protect the copyright holder. The new statute would require all hardware and software distributed in the US to incorporate circumvention technologies.

Copyright Law

Copyright law is built on the principle that in order to encourage authors to create and distribute new works, the best way to do that is to give authors some exclusive rights over the works that are created. The appropriate balance differs from country to country and finding the balance has shifted over the years. Recent American Laws, however, have given the authors the possibility of maintaining control.

Consider the premise that the copyright owner has the power to make copies – the copyright owner is given control over the copy that is made. Technological advances have strained this system and turned the system, which worked for hundreds of years, over on its head. For example, the computer cannot work without making Cache or RAM copies. Technology, it appears, is based on the creation of copies – mass copies.

Americans do not believe in author's rights at all, although there is a respect for copyright owners who should be able to control the uses of others who make a copy of the work s/he owns. The American treatment is akin to a treatment of copyright as private property. American law encourages the assignment, licenses, and sale of copyright rights in a number of ways. For instance, in the US any individual wishing to publish on the Internet is required to obtain permission from any license holder.

American culture sees collecting societies on the wrong side of capitalism. Thus, the American system requires permission from all licensed copyright holders – a problem exists in that the American license holder is not required to make public his or her rights, so it may be difficult to know if you have properly obtained all the proper permissions (there is no record of who has to be asked). Bottom Line: Nobody knows who owns what in the US. The key concept in the US is 'control'. Copyright owners are convinced that they are legally and morally entitled to protect their works. Digital technology posed the threat that this would be impossible.

Digital Controls

In theory, digital technology provides a vehicle through which incredible control over copyright can be made. However, the industry still has not found a technical protection measure that provides adequate control. Another challenge, which is an outgrowth of the trend of changing the information consumer's culture, deals with new methods of informational delivery – new business model of product delivery. The sharing and re-using of information has generated an astonishing revolution in the information space and they way we think about questions and answers.

Copyright lawyers know that information is in the public domain, but music and videos are not. While lawyers know this, there is no reason to expect the public to know this. Thus, sharing music and video is compelling for the same reason that sharing information is. The ability to share and trade music from personal collections is intensely compelling:

1. Anything is available;
2. Bandwidth restrictions are lessening; and,
3. Compression increases speed

What is troubling about peer-to-peer sharing is that no revenue is flowing to the people that create the music. In the US, where there are no compulsory licenses or collecting societies, there is a very real danger that nobody would get paid. The US is trying to make unlicensed technology not only illegal, but also impossible. If legal rights do not supply the control, we need to find that control by regulating hardware and technology to prevent unlicensed technology – anti-circumvention legislation and technical protection measures.

Private Copying – consumers were given the right approximately 10 years ago to make copies of their own music and this was achieved by imposing a levy of blank media.

DMCA – Digital Millennium Copyright Act

Enacted in 1998 contains far-reaching provisions intended to prevent unauthorized digital copying by making it illegal to provide tools designed to circumvent technological access and license controls. One lawbreaker can result in half a billion copies, making it all the more important to prevent the creation of tools allowing for the circumvention of the controls. Moreover, providing tools or information that might allow someone else to circumvent the controls is not allowed.

Criminal Prosecution – Russian Circumvention.

A Russian graduate student wrote a program legal in Russian that will allow an individual to edit the text of an Adobe E-book that is prevented by the security features of Adobe. The graduate traveled to the US and spoke at a conference – he was arrested, indicted, and detained on five counts of criminal law.

The law has not effectively reduced digital copying? The Film Industry, thus, lobbied for Plan B.

Consumer Broadband and Digital Promotion Act (Hollings Bill)

It would be illegal to sell and import and computer hardware, software, or encoder/recorder without copy protection technology. Copyright owner lobbyists are supposed to negotiate with the manufacturers and come up with an agreeable standard. The problem posed by the Internet is attacked by requiring manufactures to encode and encrypt copies and attach copy control flags into media.

New Challenges for Digital Delivery

New digital distribution systems will render the older analog ones obsolete, which is accomplished through this mandatory encryption and copy control technology incorporated by manufacturers. This poses many problems for American manufacturers: why would someone purchase an American made device knowing that these controls are in them?

In a network digital world, the information space suggests that when distribution costs are insignificant, disseminators seem not to need the assurance of control to distribute. The music copyright wars suggest that distribution is being prevented and not supported. The argument is that this cost-effective distribution vehicle is being stifled from being developed because of the implications if digital copying.

The vast majority of creators in the US can barely afford to rely on their creative abilities. Note: many of the industries complaining of copyright infringements appeared to have infringed on other copyright as well. US copyright wars have generated damages in the vicinity of \$100m dollars, and very little of this trickles back down to the original creator.

Market Analysis

The value of control to the copyright system appears to be questionable. Will controls provide the solution that the US government is seeking? On many levels, it appears that the US systems is not returning money back to consumers.

There are a number of models that may be better than TPMs and their protection:

1. Collecting Society Model – work a great deal better in terms of paying the authors;
2. Compulsory License Model – may be effective in getting money to people and preventing industry cartels from preventing the growth of competitors