

CANADA AND THE UNITED STATES: DIFFERENCES IN COPYRIGHT LAW

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Canada is a party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Copyright Act governs copyright protection in Canada. It extends the same protection to both Canadian nationals and foreign nationals of other Berne Convention countries. In 2012, substantial amendments were made to the Copyright Act for the purpose of modernizing Canadian copyright law. There are many fundamental similarities between U.S. and Canadian copyright law. Some key similarities include:

- **The concept of originality:** Canada, like the U.S., confers protection to original works as an essential condition of protection.
- **The nature of the works protected:** Both countries recognize protection for relatively comparable subject matter. The Canadian Act recognizes original literary, dramatic, musical and artistic works, however, these terms have been given a broad definition. The U.S. statutory language protects all original "works of authorship." Ultimately, the categories of protected works are comparable in both countries.
- **Registration is not required:** As in the U.S., registration of copyright is not required for the protection to be recognized in Canada. However, registration confers certain presumptive benefits in Canada, while lack of registration in the U.S. limits certain available remedies. For example, both countries recognize the presumptive validity of a registration as evidence in a court proceeding. While registration in Canada is not required for a plaintiff to claim statutory damages, a Canadian registration is of significant assistance in evidencing rights in both civil and criminal proceedings. Importantly, registration in one country does not extend to the other country.
- **Anti-circumvention prohibitions:** Canada now prohibits the use and sale of technologies designed to circumvent technological protection measures, similar to prohibitions found in the U.S. Digital Millennium Copyright Act (DMCA).

- Limited liability for Internet service providers (ISPs): Canada now provides statutory recognition of a limitation on ISP liability when they are acting solely as intermediaries in providing services related to the operation of the Internet or other digital networks, similar to protections for ISPs found in the DMCA.

However, there are also many differences.

Duration of protection: different terms

Canada continues to recognize a duration of copyright as the author's life plus 50 years. Whereas since 1998, the basic term of copyright in the U.S. is the author's life plus 70 years. As in the U.S., the term of protection may vary depending on the circumstances of creation and publication.

Authorship: the individual remains the author

Unlike the U.S. Act, the concept of "work made for hire" does not exist in Canadian law. As a general rule, the authorship of a work made pursuant to a contract remains with the employee or contractor, even where the ownership is held by the employer. This is contrasted to the law in the U.S. where the author and owner of a work made for hire is the employer (often a corporation). The difference can affect the duration of the copyright. In Canada, the duration of the copyright remains based on the author's life plus 50 years regardless of whether the work was created in the context of employment or a contract for service.

Moral rights: rights held by the author

Canada confers moral rights to all types of protected works, whereas the U.S. recognizes moral rights in the context of visual artists only. Moral rights comprise the author's right to be associated with the work and the right to the integrity of the work. The assignment of the copyright in a work does not necessarily imply a waiver of the moral rights.

Ownership: government works

In Canada, works produced by government employees as part of their duties are subject to copyright protection. Works created under the direction or control of a government department are subject to Crown Copyright. The copyright in these works is held by the

government. In contrast to the U.S., there is no legislation in Canada excluding government documents from domestic copyright protection.

Ownership: rights of co-owners

The rules applying to co-ownership can vary depending on the circumstances. The outcome for the co-owners may be different between Canadian and U.S. law. As a general rule, subject to any agreement between joint authors, co-owners of copyright in Canada may assign their interest in a jointly owned work without the consent of the other co-owners. Joint owners may not, however, licence the jointly owned work to others without the consent of the other joint owner(s).

Enforcement rights: exclusive licensee

In Canada, an exclusive licensee is expressly entitled to commence proceedings in its own name to enforce its own rights in the copyright work and receive its own remedies under the Act, however it will in many cases be required to join the copyright owner as a party to the proceeding unless permission of the court to proceed without the copyright owner is obtained. It is also not possible for an exclusive licensee to claim for copyright infringement against the owner/licensor.

Fair use: the Canadian fair dealing

Canada's "fair dealing" provision is expressed as a limited in its categories of exceptions to copyright infringement, rather than the more open-end concept of U.S. "fair use." In Canada, "fair dealing" is limited to the sole purposes of research, private study, criticism, news reporting, education, parody and satire. It is also mandatory in Canada to attribute the source of the material for criticism, review, and news reporting but not for the remaining protected purposes.

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