

COPYRIGHT PROTECTION: DIFFERENCES BETWEEN U.S. AND CANADIAN LAW

Smarter Way to Cross Blog Archives
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Copyright law protects creative works such as books, paintings, sculptures, songs, and movies. Businesses, nonprofit organizations, and individuals often own a wide variety of copyrights. Sometimes a copyright owner will not fully appreciate the value of a copyright until the creative work is infringed. Once infringement occurs—something that happens all too frequently, especially in the Internet age—the question shifts to rights and remedies.

Canada and the United States are both parties to the Berne Convention, an international agreement governing copyright law. The Berne Convention ensures that a work protected by copyright in one treaty country will be given the same protection in another treaty country as if the work were created in that other treaty country. The Berne Convention also does away with rules that require adherence to rigid formalities in order for copyright to arise, such as the old rules requiring copies of the work to bear a copyright notice.

In addition to the common ground provided by the Berne Convention, the copyright laws of the U.S. and Canada bear a number of similarities. For example, both countries confer protection on original, creative works. Although the Canadian Copyright Act uses different terminology than the U.S. Copyright Act, both laws protect works in comparable categories (e.g., literary, musical, dramatic, artistic, visual, audio-visual, and architectural works).

In both countries, registration of copyright is not required for a copyright to arise, but registration confers important benefits. For example, registration creates certain legal presumptions regarding the validity of the copyright. In the United States, registration is generally mandatory in order to bring a copyright infringement lawsuit. In contrast, Canada does not require registration in order to sue for infringement.

Many other differences exist between U.S. and Canadian copyright law despite recent harmonization attempts. These differences are important because of their impact on the available scope of protection. Here is a list of a few key differences:

Moral Rights. Moral rights are an author's right to be associated with his or her work and an author's right to the integrity of that work. For example, if an artist has moral rights in a sculpture, the sculpture cannot be altered or distorted without the artist's permission. The United States recognizes moral rights only in the context of visual artists. Canada, however, confers moral rights on all types of protected works. As such, Americans often overlook moral rights waivers in assignments. Beware—Canadian copyright assignments do not necessarily imply a waiver of moral rights.

Work for Hire. If you're Canadian, you're likely unfamiliar with the concept of "work made for hire." It simply does not exist in Canadian copyright law. In Canada, generally, the authorship of a copyrightable work made by an employee remains with the employee. In contrast, in the United States, an employer is automatically deemed the author and owner of a copyrightable work created by an employee in the course of his or her duties for the employer, i.e. a "work made for hire."

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Term Length. The basic copyright term in the United States is the author's lifetime plus 70 years. If the work was a "work for hire," then copyright persists for 120 years after creation or 95 years after publication, whichever is shorter. For works created before 1978 in the United States, copyright term gets more complicated. Canada's copyright term is much simpler—the author's life plus 50 years.

Fair Use / Fair Dealing. Fair use is the U.S. concept allowing certain uses of copyrighted materials without the owner's permission, such as the ability of a teacher to reference materials in a classroom, or the right of a news reporter to quote and comment upon another author's materials. The U.S. concept of fair use is broad and hard to define with specificity (although it is not as broad as many infringers would like to believe). In contrast, fair dealing is the Canadian concept. It allows a more limited use of copyrighted materials than the United States' open-ended notion of fair use. Fair dealing is limited to education, satire, parody, research, private study, criticism, and news reporting. Canadian law also requires attribution of the source material for criticism, review, and news reporting. On the other hand, the U.S. concept of fair use intends to balance the public's interest in open access with the property rights of copyright holders. In determining whether the use made of a work in any particular case is a fair use, the following factors are considered in the U.S.:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

Legal guidance is recommended on both sides of the border when one is planning to copy materials and claim fair use or fair dealing.

Governmental Works. Copyrightable works created by the U.S. government and works produced by government employees as part of their duties are automatically in the public domain. These works cannot be copyrighted under U.S. law. In contrast, works produced by the Canadian government and by government employees as part of their duties are subject to Crown Copyright. Canadian crown copyright is based on the concept of royal prerogative and "is not subject to the usual statutory copyright term."

As shown above, there are still a few notable differences between American and Canadian copyright law.

As we continue to traverse through the digital age, copyright law becomes increasingly important, international in scope, and—unfortunately—rapidly outdated. Companies in a copyright-heavy industry such as publishing, software, design, marketing, and art should continue to stay informed about changes in copyright law domestically and abroad.