

# Key Notions Concerning Copyright

## Frequently Asked Questions

### What is copyright?

Copyright is among the **main intellectual property rights**.

In addition to copyright, the main intellectual property rights also include trademark rights, patent rights, industrial design rights, and trade secret rights.

In general, copyright confers on the owner of the rights to an original work a series of sole rights (referred to as copyrights). In Canada, copyright is governed by the Copyright Act (hereafter referred to as the "CA"), a federal law. Other than copyrights, the CA also protects moral rights.

### What does copyright protect?

Copyright protects literary, artistic, dramatic, and musical works. Each of these categories encompasses a wide range of works, including:

- **Literary works:** books, poems, literary works in translation, written speeches, paintings, pamphlets, journals, software programs.
- **Artistic works:** paintings, sketches, sculptures, engravings, house plans, photographs, maps.
- **Musical works:** any musical composition, with or without words.
- **Dramatic works:** works that can be recited, choreographies or pantomimes whose staging or direction is fixed in writing or otherwise, any work expressed by a process analogous to cinematography, whether or not it is accompanied by a soundtrack.

### What is not protected under copyright?

Copyright **does not protect ideas**. Ideas come under the public domain, and anyone is free to take inspiration from them. Nor does copyright protect "facts", regardless of their size or relative importance. Copyright **protects the expression of ideas in works**, but not the ideas themselves.

### What conditions are attached to copyright protection?

Copyright in Canada protects **all original literary, artistic, dramatic and musical works** created by a citizen or resident of Canada or of a country that is a party to one of the international conventions listed in the CA.

To be protected under the CA, **a work must be that of an author** (an individual and not an animal) and must be fixed to a material form. Broadly speaking, the notion of fixation signifies being attested under a reasonably permanent form. In general, for example, copyright cannot apply to a simple and spontaneous verbal conversation between two people. On the other hand, the written speech of a politician could be protected.

## What is an author?

The authors of a work are **individuals who participated in the materialization of a work in material form through the non-negligible exercise of talent and judgment**. The question is that of determining who exercised their talent and judgment to lend a form of expression to an idea, to fix it in material form. The author of a work must actively participate in its materialization.

Acting as a simple scribe is not sufficient to be deemed an author, and the person who only provides ideas cannot be deemed an author, either.

## What is an original work?

Copyright protects original works, i.e., those which are **the product of the author exercising their talent and judgement**. The exercise of talent and judgment must not be negligible to the point that it can be assimilated into a purely mechanical enterprise. For example, any talent or judgment required to effect a mere change in the font of a work so as to create another work would be too negligible to be deemed original. While a creative work is original by definition, creativity is not essential to originality. The work does not have to be innovative or unique to be protected, therefore. To be original, the work must not be a copy of another work.

## What rights are conferred by copyright?

Copyright on a work includes the sole right to produce or reproduce the work or any substantial part of it, to perform or present the work or any substantial part of it in public and, if the work is not published, to publish it or any substantial part of it. Copyright also includes the sole right to:

1. Produce, reproduce, present or publish a translation of the work.
2. Transform it, if it is a dramatic work, into a novel or other non-dramatic work.
3. Transform a work, if it is a novel or other non-dramatic work or artistic work, into a dramatic work, through a public performance or other performance.
4. Make a sound recording or a cinematographic film of it, or a recording or film in a different medium, if it is a literary, dramatic or musical work, and use the said recording or film to mechanically reproduce, present or perform the work.
5. Publicly reproduce, adapt or perform the work as a cinematographic work, if it is a literary, dramatic, musical or artistic work.
6. Communicate to the public, by telecommunication, a literary, dramatic, musical or artistic work.
7. Present an artistic work created after June 7, 1988 – other than a geographical map or nautical chart, a plan or a graph – to the public during an exhibition, for purposes other than selling or leasing.
8. Lease a software program that can be reproduced within the normal framework of its use, except for the reproduction carried out during its execution with a computer or other machine or device.
9. Lease any sound recording, if it is a musical work.
10. Transfer property, if it is a work in the form of a tangible object, notably through the sale of the object, inasmuch as its ownership was never transferred in Canada or abroad with the authorization of the copyright owner.

The copyright on a work also includes the sole right to authorize the acts listed above.

## Other objects of copyright - Performances

The Copyright Act protects “**performances**” by “**performers.**” These copyrights are separate from the copyright on a work.

Whether or not the work subject to the performance is still protected, a performance signifies:

1. The presentation of an artistic, dramatic or musical work by a performer.
2. The recitation or reading of a literary work by the performer.
3. A dramatic, musical or literary improvisation by the performer, inspired or not by a pre-existing work.

The performer has a **copyright that includes the sole right to their performance or to any substantial part of it.**

**Non-fixed performance:** Non-fixed refers to live performance. For example, the performance of song, a performance by a musical group, the live performance of a theatre play or a choreography by a dance troupe. Thus, for these live performances, the performer has the sole right to their performance, including the right to authorize the following acts:

1. Communicate to the audience by telecommunication (e.g., the performer’s performance cannot be broadcast live on the Web without the authorization of the performer).
2. Perform the work in public when it is communicated other than by a communication signal.
3. Fix it on any material form whatsoever (e.g., recording the live performance).

**Fixed performance:** The performer has the right to control the reproduction of any fixed performance without their authorization. When the performer authorizes the fixation of the performance, the performer has the sole right to authorize any reproduction of the performance made for purposes other than those cited in the performer’s authorization. In certain situations, the performer also has the sole right to lease the sound recording of their performance.

However, nothing prevents the performer from setting out, in a contract, the conditions of use of their performance for purposes of a radio broadcast, fixation or retransmission. That said, as soon as the performer authorizes the incorporation of their performance into a cinematographic work, the performer can no longer exercise, in regards to the performance thereby incorporated, the copyright cited in the two above paragraphs.

It is important to remember the rights of performers, notably when a performance is recorded for the purposes of a webcast. Before fixing a performance in any manner whatsoever, it is always prudent to secure the prior authorizations from the performer through a written contract. The performer is the first owner of the copyright on their performance.

## What is the difference between being the author of a work and owning the copyright on a work?

The author is the person who **exercised their talent and judgment to fix a work** in material form. The copyright owner is the person who holds the sole rights listed above. As a general rule, **the author of a work is the first owner of the copyright on that work.**

## What is a work made in the course of employment?

When the author of a work is in the employment of some other person under a contract of service or apprenticeship, and the work is performed in the course of their employment, the employer, in the absence of any agreement to the contrary, is the first owner of the copyright on the work. In other words, when an employee produces a work in the course of their employment, the Copyright Act stipulates that the copyright belongs to the employer.

Attention: This rule does not apply when the person who created the work is an independent contractor as opposed to an employee.

For example, an independent photographer hired by a couple to take photos on their wedding day would generally be considered an independent contractor and not an employee of the couple. Even if the couple pays the photographer to take photos, the photographer remains the owner of the copyright on the photos, unless a written contract calls for assigning the rights to the photos to the couple.

When an enterprise wishes to be the owner of copyrights to works created by the contractors they hire, it is important to ensure that the contract with the contractor calls for assigning the rights to the works created under the contract. It is also prudent to include such a provision in employment contracts.

## Should a copyright be registered in order to be protected?

No. Protection of the copyright to a work is not subject to any formality, and it is effective from the moment the work is created. Registering a copyright is optional, therefore.

However, registering a copyright confers on the copyright owner significant advantages. The certificate of registration of copyright constitutes proof of the existence of the copyright and the fact that the person registering it is its owner.

## What are the differences between copyrights and the terms of use attached to a dissemination platform?

It is important not to confuse copyright with the terms and conditions pertaining to the use of social media platforms. Certain platforms can prohibit specific activities that could be acceptable under copyright. It is possible to regulate the use of works by users through a contract, and these contracts can be stricter than the rules established under the Copyright Act. The terms of use attached to social media platforms generally contain user licenses for works posted on the platforms. It is always prudent to read these licenses before broadcasting a work on a Web platform.

It can sometimes be difficult to ensure that copyrights are respected on the Web. People who reproduce works on the Internet without authorization can be difficult to identify and find outside of Canada. But simple and effective tools are available to help companies and individuals counteract copyright infringement acts on the Web. One of the tools available on all major social media platforms is the “notice of copyright infringement” (or DMCA takedown notices). The Digital Millennium Copyright Act (DMCA) is an American law adopted to fight against copyright infringement. Broadly speaking, through this regime and other laws adopted throughout the world, social media platforms have established simple procedures that allow copyright owners to report a copyright infringement on their platforms. If the platform determines that a complaint is well-founded, it will remove the content violating copyrights. For example, you can click on the following links to access the forms available on YouTube and Instagram.

# What is a collective administration society?

Collective administration societies are organizations that ensure the administration of a licensing system applied to a repertoire of works, performances, sound recordings or communication signals by several authors, performers, producers of sound recording or radio broadcasters, from which they establish use categories that they authorize, along with related royalties and conditions.

Essentially, administration societies manage the granting of licenses to use works in their repertoire, by setting out specific terms of use of those works. Administration societies also collect royalties and distribute them to copyright owners.

To view a list of collective administration societies in Canada: <https://cb-cda.gc.ca/fr/information-sur-le-droit-dauteur/societes-de-gestion-collective>

For example, through an administration society, an enterprise can secure a license to play music in the entrance hall of a performance venue. Administration societies essentially make it possible to secure a license directly from the administration society rather than from the copyright owner. Broadly speaking, administration societies facilitate the licensing process.