Copyright in Musical Works
by Peter Mercer

The protections afforded by copyright law seem easy to identify since the very word copyright suggests its purpose: to preserve the "right to copy" one's own work and to prevent others from doing so without permission. However, the notion of "copying" embraced by the definition of copyright in the Copyright Act of Canada is broader than might be expected. It includes not just authoring and composing but also performing, producing, reproducing and publishing. Furthermore, if we turn our attention specifically to copyright in musical works, we find that legal protection is extended to mechanical devices such as cassettes, records and tapes. Copyright law, therefore, can actually be rather complicated.

The following is an attempt to simplify matters by describing the basic Canadian law of copyright as it affects musical works. It is likely to be of greatest interest to those actually involved in the various facets of music composition, performance, production and publication. It must be emphasized, however, that individual cases pose their own complications and that anyone who suspects they have a copyright problem should seek independent legal advice.

A "musical work" is defined in the Copyright Act of Canada as meaning "any combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced." Compositions with or without words would be included in this definition but note that the lyrics would be protected separately as they would fall under the definition of literary works. Furthermore, the right to perform the work is separate from the right to publish or make copies of it and can be owned separately.

In considering the position of the song writer, the first point to be made is that copyright is automatic. Once an original work is created, section 4 of the Act provides immediate copyright protection for the musical composition and the actual words used. It is not necessary for a song writer to go through any formal legal steps in order to establish copyright. Nor is publication of the song necessary. The Act simply requires that the song be "printed, reduced to writing or otherwise graphically produced" in permanent or fixed form - i.e., written or recorded.

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But, you ask, how could I prove my copyright if somebody claimed one of my songs as their own? A simple way of overcoming the problem of proof is to send a copy to yourself by registered mail and keep the sealed envelope and dated registration receipt in your possession. A more expensive alternative is provided by the federal government’s voluntary registration system. Printed forms of application for copyright registration for both published and unpublished works are available from the Copyright Office in Ottawa K1A 0C9. If you wish to take advantage of this system you must send the completed form and a $25.00 certified cheque payable to The Receiver General of Canada to the Copyright Office by registered mail. In return, a certificate is issued which can be used to confirm ownership of copyright. To repeat, registration is voluntary and creates no new or additional legal protection.

In order to be copyrighted, a song must be original, meaning simply that it must not be copied from another. The theme or thoughts on which the song is based, however, need not be original and its artistic merits are irrelevant.

It may be that a song is qualified to be protected by Canadian copyright law but the writer is not. Section 4 of the Copyright Act prescribes that, at the time of completing the song, the writer must have been one of the following:

(a) a Canadian citizen or a British subject, or
(b) a citizen or subject of a country belonging to the Berne Copyright Convention, or
(c) a citizen or subject of a country belonging to the Universal Copyright Convention, or
(d) a citizen or subject of a country which grants or has undertaken to grant, either by treaty, convention, agreement or law to citizens of Canada the benefit of copyright on substantially the same basis as its own citizens, or
(e) resident within Her Majesty’s Realms and Territories.

The two international copyright conventions, the Berne and Universal Copyright Conventions, are adhered to by most countries. They also guarantee that a Canadian writer’s copyright is valid in countries which belong to them.

Under the Canadian legislation, it is not necessary to indicate on your works that you hold copyright in them. Such is not the case, however, under the Universal Copyright Convention for those wishing to retain their copyright in countries (such as the United States) which require registration. In order to do so, all copies of your works must be marked from the time of first publication with a circled small c, the name of the copyright owner and the year of first publication. A song is only published when copies of it have been issued to the public. The mere public performance of a musical work does not constitute publication.

Once copyright is established, the length of time for which it will exist can vary. For example, copyright in published works exists for the life of the writer plus 50 years, however, if the song is unpublished at the time of the writer’s death, the term may be considerably increased through the Act’s stipulation that copyright runs for 50 years from first publication. Upon death, copyright forms part of the estate to be passed on to the writer’s heirs. For works which are jointly written, copyright lasts for the life of the writer who dies last plus 50 years. For mechanical contrivances (as they are called) such as records and tapes, the term of copyright is 50 years from the date of making the original plate from which the contrivance was derived. It should perhaps be noted here that just as the Copyright Office will not assist song writers in publishing their works, neither will it police their copyright to prevent others from infringing it.

Of greatest advantage to most copyright holders is their right to sell or assign their copyright in whole or in part. The commonly desired route for a song writer is to enter into a contract with a publisher who pays cash in return for the right to make and sell copies. If the actual ownership of the copyright is transferred in return for a lump sum payment or royalties, the transaction constitutes an assignment and must be in writing and signed by the owner to be valid. On the other hand, if the grant of copyright is for a limited time or purpose, the transaction is properly described as a licence.

The separate right of public performance of a musical work, mentioned earlier, can also be given up in return for royalty payments. It is here that the performing right
societies come in. Royalties payable for a public performance of a musical work (including a public performance of records and tapes) are payable to one of two performing rights societies who are authorized by the Copyright Act to collect fees on behalf of their members and distribute them to their members. There are two such performing rights societies in Canada, both headquartered in Toronto: the Performing Rights Organization of Canada Limited (PROCAN) and the Composers, Authors and Publishers Association of Canada Limited (CAPAC). They serve a particularly valuable function by entering into agreements with radio stations on behalf of the performing artists who are thereby relieved of the burden of keeping a record of on-air performances of their works. The CopyrightAppeal Board prescribes rates which determine the lump sum payments made to the artists themselves. It would of course be open to a song writer/performer to arrange to have royalty payments made to a third person or body of his choice.

If the copyright holder has not licensed or assigned away the right to publish, copy or perform his work than it will be an infringement of his copyright for anyone else to do so without his consent. Nor will it be a defence that only part of a song, for example, was purloined since reproduction of any substantial portion will still constitute infringement of copyright. Whether the part copied was actually substantial is a question of fact to be decided in light of all the circumstances of the case.

The mere fact that two works are similar does not raise a presumption that one was copied from the other. Song writing provides a good example. So many songs are written that there are bound to be similarities, however, a second song writer who independently produced a work similar to another has not infringed copyright. It may simply be a coincidence that the second song resembles the first or a result of both song writers using the same sources. The holder of copyright in the first song would have to prove that his song was actually the source of the second writer’s work. To do so, it would also be necessary to show that the second writer had a reasonable opportunity to copy; if there was no access to the allegedly copied material, there can be no finding of copyright infringement. It is not necessary, however, to show that the second writer meant to infringe copyright or even that he copied consciously.

Having said that, it is well established that a new arrangement of an existing piece of music is not an infringement of copyright. In fact, a new adaptation such as a piano arrangement of an orchestral score is itself entitled to be copyrighted. In such a case both the arranger and the original composer will hold copyright separately, although the composer will have the superior legal right to restrain the performance of the new arrangement while his copyright in the original subsists. Similarly it is possible to establish in well-known traditional music. It has been over one hundred years since the English courts held that a new and original work could be created by writing an accompaniment to a traditional tune.

There are also instances where the law will not impose any penalty even where a work was copied. For example, under section 17(2) of the Act “any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary” does not constitute an infringement of copyright. The phrase “fair dealing” is not otherwise defined in the Act but it basically provides for the copying of small excerpts of a copyrighted work for the purposes described. Again, the question of whether the copying of excerpts constitute fair dealing or infringement is a question of fact about which little guidance can be given - except to say that the excerpt clearly must not be greater than what is necessary to serve the purposes set out in section 17(2).

There are few other limited exceptions to the infringement