

Podcasting Legal Guide for Canada:

Northern Rules For The Revolution

Podcasting Legal Guide for Canada
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Podcasting Legal Guide For Canada: *Northern Rules For The Revolution*

0.1 Acknowledgements

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Working within the Law & Technology program at the University of Ottawa, Kathleen Simmons did the bulk of the work updating the substantive aspects of the Guide to Canadian law. Among other things, her contribution of the Copyright Matrix and the analysis of the many layers of collective societies in Canada will certainly be put to many uses beyond this Guide.

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May 2007*

0.2 Foreword

The Canadian Radio-television and Telecommunications Commission has faced seemingly continuous criticism for years, however, in May 1999 it released a decision that generated near-universal praise. The New Media decision, which adopted a hands-off regulatory approach to new media, was widely regarded as the right decision at the right time.

Since that ruling, a remarkable array of new media services have emerged outside of the traditional broadcast regulation model. Few offer as much promise as podcasting. Conventional broadcasters have jumped on the podcasting bandwagon, with many now offering podcasts of favourite shows bundled together with advertising, yet it is the thousands of Canadians creating home-grown audio content who are responsible for the freshest, most original, and most diverse programming.

The Canadian podcasting community is emerging as an important voice in Canada that deserves broad support and attention. While accessible and easy-to-use technology has removed many technological barriers for would-be podcasters, the legal challenges can be daunting. Podcasting touches on several legal areas, including copyright, trade-mark, and personality rights, each of which brings its own complexities and uncertainties. Conventional broadcasters typically enjoy the benefit of internal legal resources, however, until now most individual podcasters have been forced to confront legal questions on their own.

The arrival of the *Podcasting Legal Guide for Canada* addresses that dilemma. Andy Kaplan-Mytht, Kathleen Simmons, and Creative Commons Canada have come together to produce a first-rate legal guide that will undoubtedly become a “must-read” for the Canadian podcasting community. The guide helpfully unpacks complicated legal issues, providing straightforward guidance on the use of text and music within podcasts. Moreover, by focusing exclusively on Canadian law, the guide will help to eliminate the tendency to confuse U.S. and Canadian approaches to the law associated with podcasting.

After reading the guide, many podcasters may well conclude that the law is in dire need of reform, as its complexity remains a significant challenge for many future Canadian podcasters. If so, it will have an unintended benefit – educating podcasters about the state of Canadian law and galvanizing this important group to become more vocal on issues related to copyright law reform.

As audiences continue to grow, the legal issues associated with producing podcasts become unavoidable. This guide makes an important contribution to our understanding of those legal issues and promises to assist a new generation of Canadians who require little more than a personal computer and the Internet to make their voices heard.

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1 Introduction

Welcome to the Podcasting Legal Guide for Canada. An electronic version of this Guide is available on www.creativecommons.ca.

1.1 Purpose

The purpose of this Guide is to provide you with a general roadmap of some of the legal issues specific to podcasting with an emphasis on identifying how those issues may apply in the Canadian legal environment. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) has produced some practical and helpful resources related to legal issues affecting the internet that you can find at <http://www.cippic.ca>. In addition, EFF has produced a very practical and helpful guide for issues related to blogging generally (<http://www.eff.org/bloggers/>). While their guide is focussed on US law, it may still be helpful in pointing you in the right direction. This Guide is not intended to duplicate efforts by CIPPIC or EFF, and in many cases refers you to their resources that address crossover issues. Our goal is to complement their FAQs and address some of the standalone issues that are of primary relevance to podcasters in Canada.

1.2 Canadian-Law Only

This Guide covers only Canadian-based legal questions. Since podcasts are typically distributed worldwide, legal issues from other jurisdictions are relevant for you but we are unable to include them at this time.

1.3 This Guide Does Not Provide Legal Advice

This Guide provides general information about legal topics but it is not a complete discussion of all legal issues that arise in relation to podcasting nor is it a substitute for legal advice. Using this Guide does not create a solicitor-client relationship. This general legal information is provided on an “as-is” basis. The authors and contributors make no warranties regarding the general legal information provided in this Guide, and disclaim liability for damages resulting from its use to the fullest extent permitted by the applicable law.

Please also note that this Guide attempts to provide an overview of how the law is likely to treat many of the issues that arise in relation to podcasting. At all times, you should bear in mind that this Guide does not advocate for how the law should treat podcasting. It describes the current state of the law.

1.4 Licence & Attribution

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1.5 Organization

The next section, Section 2 – “Legal Issues In Creating Your Own Podcast” – of this Guide jumps right into some of the legal questions that you may need to think about when incorporating different types of material into your podcast. Section 3 – “Copyright Issues” – discusses copyright issues that may arise in the creation of your podcast, including which copyrights are implicated in different uses of music in your podcast. Section 4 – “Legal Issues Surrounding How You Distribute Your Podcast” – discusses options for how you can deal with the output of your own podcast, e.g., your licensing options for when you distribute your work. Finally, Section 5 – “Background and Further Resources” – provides you with a list of further resources.

2 Legal Issues In Creating Your Own Podcast

When creating your own podcast, it is important to make sure all necessary rights and permissions are secured for the material included in your podcast. This is relatively easy if you create all of the material that is included in your podcast but can become progressively more complex the more you include material created by other people. If you do not obtain the necessary rights and permissions, you may get into legal trouble for incorporating third party material into your podcast and for also authorizing others to use that material as part of your podcast.

2.1 Overview Of The Legal Issues You Need To Consider

The main legal issues that you will likely face that are unique to podcasters are related to copyright, publicity rights and trade-mark issues.

Podcasters share similar concerns to bloggers in relation to defamation, privacy, reporter's privilege, media access, election and labour laws, and adult or even obscene materials. Consequently, if the content of your podcast is likely to involve one of these issues, you should check the corresponding section of the CIPPIC FAQ (<http://www.cippic.ca/en/faq-resources/>) or the EFF Bloggers FAQ. (<http://www.eff.org/bloggers/lg/>)

2.2 Why Is Copyright Law Relevant?

Copyright law is relevant to podcasts because it applies to creative and expressive works, which are most of the things that are likely to be included in a podcast. This includes, for example, performances, scripts, interviews, musical works and sound recordings. Under current Canadian copyright law, copyright attaches automatically to original works once they have been "fixed", i.e. written down or recorded. However, musical works may be protected even if unfixed.¹ See Section 3.7 – "Using Music" for further information. This means that when you come across such a work, as a general rule and subject to some exceptions noted in Sections 3.2 – "The Good News: 5 Instances Where Permission Is Not Required", 3.3 – "Special Rules For Librarians Or Teachers" and 3.11 – "Fair Dealing Under Copyright Law And Its Application To Podcasts", you should assume that it is protected by copyright.

Copyright law gives the owner of copyright the exclusive right to control certain activities in relation to the work. For example, under Canadian law, a copyright owner has the exclusive right to produce or reproduce the work, or any substantial part thereof.² This means the copyright owner has the right to exclude others from making copies of their work, making changes to it, distributing it to the public or making a public performance of it. Consequently, any person other than the copyright owner who wishes to do any of the protected acts in relation to the work must secure permission from the copyright owner before doing so, unless an exception or exclusion applies.

When you make a podcast that includes third party content, you potentially tread upon several of copyright's exclusive rights, such as:

- a) Copying the work to include it in a podcast;
- b) Adapting or changing the work to include it in the podcast;
- c) Communicating a work to the public by telecommunication as part of a podcast for transmission to members of the public; and
- d) Authorizing members of the public to make a copy of the podcast and use it according to the terms you apply to the podcast.

This Guide sets out some of the issues that need to be considered to identify whether you own the necessary copyright and/or have the appropriate permission so that you do not infringe someone else's copyright. Learn more in Section 3 – "Copyright Issues".

2.3 Why Are Publicity Rights Relevant?

Publicity rights allow individuals to control how their voice, image or likeness is used for commercial purposes in public. While Canada doesn't expressly recognize publicity rights, the concept is protected under the tort of misappropriation of personality. This is relevant to podcasting because, in many instances, a podcaster will conduct audio or video interviews, perform plays, sing songs, and produce all sorts of other spoken or visual content. When transmitting this sort of content, including the voices or images of anyone other than yourself, you may need to get permission from those individuals if you are using their voice or images for commercial purposes. For example, if you have images from an interview with someone on your website and you use those images to promote your podcast, solicit advertising, or make other commercial uses, you may need consent from the individual appearing in the image.

Rights of publicity are a common law concept in Canada, closely associated with the tort of misappropriation of personality, which "involves taking aspects of someone else's personality (such as a name, reputation or likeness) for commercial gain without that person's permission."³ While the elements of the tort have not been clearly laid out, an analysis of *Krouse*, and subsequent case *Athans*,⁴ indicates that an individual must show that there was merely an "identifiable use" of their image in conjunction with a commercial product without their consent. This means that if you use another image, likeness or voice as a way of advertising or soliciting your podcast, you will need the individual's consent.

On its face, this seems much like the doctrine of rights of personality in the US. Where the tort of misappropriation of personality departs from this doctrine, however, is in the determination of the public interest, articulated as the "subject vs. sales" distinction in *Gould*⁵ where the court held that if the person whose name was being used was the subject of the work and there was a public interest in having the information, then the tort of misappropriation of personality could not be made out. This means that you can use the name and identifiable information about a person if they are the subject of your podcast, but not if you are using them to advertise or solicit for your podcast.

2.4 How Is Trade-mark Law Relevant?

Trade-mark law protects consumers from being misled or deceived as to the source of goods and services, or the endorsement, sponsorship or affiliation of one good or service with another. In other words, trade-mark law works to ensure that you can rely on particular branding to equate to certain product features. So for example, Joe Citizen cannot use the name CTV and apply it in a way that suggests that his podcasts come from CTV, or are endorsed by or affiliated with CTV if they are not.

While there may be little risk that you are going to use someone else's trade-mark to associate with your podcast ('cause you want to establish your own reputation, right?), trade-mark law can be implicated in what you do and say in relation to your podcast in other ways. Because you may want to comment on a high-profile company or their branding, you should have some familiarity with trade-mark law so that you can minimize your risk of infringing trade-mark rights.

The purpose of trade-mark law in Canada is two-fold: to protect consumers from buying products from an unknown source; and to protect the trade-mark owner from commercial misappropriation of their mark and the goodwill associated with it. For podcasters, trade-mark law is relevant where you use common phrases, logos, or brands in your podcasts. In doing so, you must ensure that your use of these words or phrases does not infringe a trade-mark owner's intellectual property in their mark.

2.4.1 Infringement And Passing Off

In Canada, there are two main categories of infringement in trade-mark law, distinguished according to whether the mark is registered or not. The first category applies to any mark and is based on Common Law tort of passing off which is partly codified in section 7 of the Trade-marks Act.⁶ The second category applies only to marks that are registered, and is determined according to sections 19, 20, and 22 of the Trade-marks Act.

Passing off is determined in accordance with the following test from *Ciba-Geigy v. Apotex*.⁷ The owner of the trade-mark must first establish that there is goodwill associated with the mark. Goodwill is a “business’s reputation, patronage and other intangible assets that are considered when appraising the business, especially for purchase. Because an established business’s trade-mark is a symbol of goodwill, trade-mark infringement is a form of theft of goodwill.”⁸ The owner of the mark must then establish that there has been deception of the public due to misrepresentation, and that there has been actual or potential damage. Because trade-mark law is designed to protect the public from buying goods from an unknown source, it is important that there not be any confusion about the source of the goods associated with the mark. This is why if you named your music-review podcast “The Rolling Stone Music Hour,” you may find that Rolling Stone magazine will be unhappy with you and perhaps send you a cease and desist letter (among other possible unpleasant things). If however, your podcast had to do with gardening instead of music (e.g., Rolling Stone Gardening Hour), your risk of infringement would be much smaller, because listeners are unlikely to think that the well-known music magazine was sponsoring your gardening-related podcast.

Registering a trade-mark gives the owner of the mark the exclusive right to use it in association with their wares or services. This right will be infringed where someone else uses their mark or a confusingly similar mark in association with similar wares or services, or where the mark is used in a manner that will depreciate the goodwill of the original owner. Whether a mark is confusingly similar to an existing mark is determined in accordance with section 6(5) of the Trade-marks Act.⁹ In evaluating whether something is confusing, a court will look to the strength or inherent distinctiveness of the words. For example, the use of the word “apple” in association with computers is an inherently distinctive word, whereas the use of the same word with respect to fruit is not so distinctive. A second factor in determining confusion is the length of use of the marks, where a longer co-existence indicates a lower likelihood of confusion. Consideration is also given to the nature of the wares and services – are they the same type? – and the nature of the associated commerce – are they sold on the same shelf? Finally, the overall resemblance will be considered to determine the extent of the confusion. It is important to note that confusion is determined from the viewpoint of the likely consumer, not the average consumer. This means that you can assume a reasonable amount of knowledge about the wares or services as well as the mark itself.

2.4.2 When Do I Need Permission?

Generally you do not need permission to make an informational (also called “editorial” or “nominative”) use of a trade-mark. You also do not need permission if you’re making a comparative advertisement (however, comparative ad situations often provoke trade-mark owners into legal action even when their trade-mark claims are weak especially if your statements about their product and your claims regarding your product are not wholly accurate). You will need permission if you’re making a commercial use of the mark.

You may also identify the trade-mark of another (such as your employer or former employer) if the reference is accurate and does not cause confusion. For example, “I am Sobert Roble, and I work for SicroMoft” is acceptable if the context does not falsely suggest that the employer (here, SicroMoft) endorses the podcast. But using a title for a podcast such as “SicroMoft’s Sobert Roble Speaks Out On The Issues” may suggest endorsement by the employer, and should therefore be avoided if that is not the case.

One other thing to remember is that you are not under an obligation to identify each and every trade-mark as a “registered” trade-mark. You can even use a trade-mark in the title of your podcast as long as it is not the title of series of podcasts. So, for example, you can title a single podcast “TRADE-MARK ATTRIBUTION FOR DUMMIES” and not violate the trade-mark in the “For Dummies” books (see http://www.schwimmerlegal.com/archives/2006/02/trade-mark_attri.html).

Check out the Canadian Intellectual Property Office’s website for Trade-mark [FAQ’s](#), as well as their [database](#) so you can find registered trade-marks yourself.

2.4.3 A Note About Using Trade-mark Disclaimers

If you use a trade-mark in a commercial context in your podcast, it is a good practice to include a reference to registered trade-marks of others in your show notes (if you have them) as well as in the podcast itself. A statement along these lines would suffice:

“[YOUR TRADE-MARK] is a trade-mark of [YOUR NAME]. All other trade-marks mentioned are the property of their respective owners.”

You may also check with the company whose trade-marks you reference and read its trade-mark use policy typically found on its website. While using a disclaimer does not immunize you or clear your rights to use a particular trade-mark in a commercial context, it can help to show your good faith.

2.5 What Other Issues Should I Be Thinking About?

As a podcaster, you will face many of the same legal questions that bloggers face. EFF’s Legal Guide to Blogging (<http://www.eff.org/bloggers/>) addresses many additional issues that you should consider. These include: rights in the United States related to the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (aka “Section 230”), on-line defamation, privacy, reporter’s privilege, media access, election law, and labour law. The EFF Guide is written in the context of US law so you should be careful about directly relying on it Canada. While there is currently no comparable document for Canadian bloggers, you can contact CIPPIC if you have any legal questions and they may be able to help point you in the right direction. You can find CIPPIC at <http://www.cippic.ca/>.

3 Copyright Issues

The bulk of this Guide focuses on copyright issues that may arise both when you are sourcing content and creating your podcast and when you are releasing your own recorded podcast. Copyright is a complex area of the law that has become further complicated as it has been adapted to accommodate new technologies. This section opens with a discussion of what copyright is and when it does not apply. Since podcasters need to know how to get licences for third party sound recordings that they want to include in their podcasts, this section attempts to clarify the various layers of copyright ownership and the collective societies that manage licensing for each of those layers. Finally, there is a discussion of how you might find works licensed under Creative Commons licences that you can use in your podcasts without securing licences from the collective societies.

3.1 Using Written Content Created By Someone Else: Permission Is Generally Required

As a general rule, if you incorporate text that has been written by someone else into your podcast-text that appears either on a blog, in a book, a journal, magazine or newspaper (or wherever) you will need the express and specific permission of the person who owns copyright in that material (note that sometimes the copyright owner is different than the original writer).

Written works do not have to be full of flourish and artistic merit, like novels and poetry, to qualify for copyright protection. Textual works only need minimal creativity to attract copyright protection. Under Canadian law, the level of creativity required is non-mechanical and non-trivial effort, skill and labour.¹⁰ This means most textual works that are committed to paper (or computer), including those that lack literary merit such as, for example, institutional reports, newspaper articles and unimaginative blog postings, are likely to be protected by copyright.

There is no firm “rule” about how much of a work you may or may not copy to avoid infringement concerns. The Copyright Act says that liability will occur on the taking of a “substantial part” of a work. Substantiality, however, is a question that is related more to the quality than the quantity of the work that was taken. Three things are considered in determining substantiality: (1) whether the copyright owner demonstrates ownership of a copyright in a protected work, (2) whether there is objective similarity between that work and the allegedly infringing work, and (3) whether the person copying the work had access to the original work, which will be presumed if the work was publicly available.¹¹ This means that it generally does not matter if you read the entire piece aloud without changing it or if you change it a lot and simply base your podcast loosely on the text – you cannot avoid copyright issues by, for example, changing the work by, say, 10% or 20%. Once you use the work, either in verbatim or altered format, you implicate copyright law.

Consequently, you need to think about copyright issues before you incorporate any of these materials into your podcast. In general, this means that you need to identify the copyright owner and ask them for permission to include their material in your podcast. You can often identify who the copyright owner is by checking for a copyright notice (usually in the form “© [year] [name]”) or you can ask the person who published the work for the information. For works created in Canada, you can also search the Canadian Intellectual Property Office (CIPO)’s register available at <http://strategis.ic.gc.ca/app/cipo/copyrights/displaySearch.do?language=eng>. For more information about investigating the copyright status of a work, check out the CIPO’s Copyright Circulars (http://strategis.gc.ca/sc_mrksv/cipo/cp/cp_circ_main-e.html). Note, however, that CIPO will not verify ownership of copyright,¹² so if you don’t find it there you should check with the author and/or the publisher.

3.2 The Good News: 5 Instances Where Permission Is Not Required

The good news is that you do not need to secure the separate permission of the provider of a work in five main instances. These are: (i) when the items you record as part of your podcast are not protected by copyright (see below, Section 3.2.1 – “You Are Using A Fact, An Idea, A Theory Or Slogan, Title Or Short Phrase”); (ii) when the text was protected by copyright but is now in the public domain (see below, Section 3.2.2 – “You Are Using Works That Are In The Public Domain”); (iii) to some extent, when you are using government works (see below, Section 3.2.3 – “You Are Using a Canadian Government Work”); (iv) when you are engaged in “fair dealing” of the work (see below, Section 3.11 – “Fair Dealing Under Copyright Law And Its Application To Podcasts”); (v) when you wish to make more than a “fair dealing” of the work and the work is under a Creative Commons licence that authorizes your intended use (see below, Section 3.2.5 – “You Are Using Creative Commons-Licensed or “Podsafe” Content”).

3.2.1 You Are Using A Fact, An Idea, A Theory Or Slogan, Title Or Short Phrase

Although an entire textual work may be protected by copyright, there are elements of that work that may not be subject to the exclusive rights of the copyright owner.

It is a general principle of copyright law that copyright does not extend to ideas; that copyright law only protects the creative expression. As a result, you can discuss the ideas and theories that are discussed in a blog, an editorial or other opinion piece without asking the permission of the author or publisher (although you may want to think about defamation laws before you engage in especially harsh criticism of a theory or an author; see CIPPIC’s Defamation FAQ available at <http://www.cippic.ca/en/faqs-resources/defamation/>).

Also, titles and short phrases or slogans will generally not be protected by copyright because they lack the necessary spark of creativity and so can typically be used without special permission. (But these items may receive trade-mark protection. See Section 2.4 – “How Is Trade-mark Law Relevant?” regarding trade-mark questions.)

Finally, an idea is not protected by copyright. Copyright protects the expression of an idea, but does not extend to protect ideas themselves. This protection in Canada stems from Article 9(2) of the *TRIPS Agreement* which incorporates this distinction, as it extends protection to expression (i.e. a form of expression covered under the definition of literary and artistic work) but specifically excludes “ideas, procedures, methods of operation or mathematical concepts.”¹³ This rule (called the “idea-expression distinction”) means, for example, that you can include in your podcast a discussion of factual events reported in a newspaper – such as facts about historical or current events – without obtaining permission from the copyright owner of the newspaper. It also means you could describe and discuss cooking recipes in your podcast because they do not generally receive copyright protection. Recipes (the mere list of ingredients and instructions for combining the ingredients to achieve an end product) are seen as “a system, process or method of operation.” Copyright applies to the recipe as it is written, but the idea of using one ingredient instead of another is not protected by copyright.¹⁴

3.2.2 You Are Using Works That Are In The Public Domain

You can use any work that is in the public domain without obtaining permission of the original author or copyright owner.

A work is in the public domain in Canada either when (a) the copyright term has expired, (b) the work is an unpublished work and special rules indicate it has fallen into the public domain, or (c) the author or copyright owner dedicated the work to the public domain. You will find helpful websites for determining public domain status of a work in Section 5 – “Background and Further Resources” of this Guide. We also explain below, in part (d) of this section, one wrinkle that arises when using public domain works that you need to consider to ensure that your use does not infringe anyone’s copyright.

(a) *Published Works – Term.* Currently, the copyright term in Canada is life of the author plus 50 years for content created by individuals.¹⁵ For collaborative works – those created by more than one person – the term of copyright protection is 50 years after the death of the last living collaborator.¹⁶

For works created in circumstances of employment (where the employee is under a contract of service, the work is created in the course of this contract, and there is no contractual provision to the contrary, the employer will be the owner of the copyright).¹⁷ However, since the creator of the work is still considered to be the first author, the term of copyright is the standard term: the life of the author plus 50 years.¹⁸

For works that are anonymous or pseudonymous, the term of protection is the shortest of 50 years after publication or 75 years after creation of the work. If the identity of the author is disclosed during that time, the normal rules for protection apply.¹⁹

A fair amount of research may be required to determine whether a published work has joined the public domain.

(b) *Unpublished Works – Term.* Some unpublished works are also part of the public domain. The rules for unpublished works were amended in 1997 to remove perpetual protection. Currently, the Copyright Act provides the standard term of protection (life of the author plus 50 years) to works whose authors died after the coming into force of the section, regardless of whether or not the works were published before the author’s death.

Two transitional provisions were also provided for those owners of copyright in works that had perpetual protection previous to these amendments. The first only applied until 1998, but according to the second, posthumous works by authors who died between 31 December 1948 and 31 December 1998 are protected until 31 December 2048.²⁰ No more unpublished works will enter the public domain in Canada until 2049.

(c) *Dedication To Public Domain* – Finally, it may be possible for a work to be in the public domain because an author or copyright owner has dedicated their work to the public domain. Creative Commons provides a Public Domain Dedication for use in the United States (<http://creativecommons.org/licenses/publicdomain/>). This appears to be a grey area of the law in Canada at this time and Creative Commons Canada is considering the legal status of public domain dedications in Canada.

(d) *One Wrinkle* – One additional wrinkle when using public domain works is that those public domain works may be incorporated into another work that is copyright-protected. When this happens, although the public domain portions remain unprotected by copyright, the author’s new expressive content may be protected by copyright. For example, as a general rule, slavish photographs of public domain works such as the Mona Lisa are not considered to attract copyright protection because they are designed to replicate the original public domain work as much as possible. However, a photograph of a sculpture, even a public domain sculpture, may be protected by copyright because of the skill and creativity involved in setting up the shot.

Another example is of a book that is in the public domain. Although the text of a public domain work, say, Shakespeare’s The Comedy of Errors (<http://www.gutenberg.org/etext/1504>), may be free to use (for example to record a reading of the text); an image of a recently published edition of the book – e.g. <http://www.amazon.com/gp/product/0743484886> – may implicate the publisher’s copyright in the layout and formatting of that text, the cover art, etc., thus necessitating the publisher’s consent to use an image of that book in your podcast or a determination as to whether your use amounts to a fair dealing of the published edition.

3.2.3 You Are Using a Canadian Government Work

While works created by the US government are not protected by copyright, Crown Copyright in Canadian law protects works created under the direction or control of Her Majesty or any government department. Unpublished works are protected in perpetuity, while those published are subject to protection for 50 years after their publication date.²¹ The main purpose of Crown Copyright is not to prevent public access to government documents, but to ensure accuracy in their contents. In fact, the Canadian government has waived the enforcement of copyright in relation to laws and court decisions so long as (1) due diligence is exercised to ensure the accuracy of the materials reproduced, and (2) the reproduction is not presented as an official version.²²

In circumstances where the government documents are works created by an employee in a “contract for services” relationship²³, the copyright may reside with the author as opposed to the government department. In this case, you would have to clear the rights with the author.

If you do incorporate government works into your podcast, you should also consider including in any copyright notice that accompanies the podcast a statement that identifies which portions of your podcast are protected by copyright and which are Canadian government works. This is important for several reasons: (1) it allows people to know which works they can freely use and repurpose; (2) it removes the ability, if you bring an action against someone for infringement, for that person to argue that they did not have proper notice of the copyrighted status of your work.

3.2.4 You Are Engaged in “Fair Dealing”

You may engage in “fair dealing” of a copyrighted text without obtaining permission of the copyright owner. We discuss “fair dealing” in more detail, and provide some examples, in Section 3.11 of this Guide – “Fair Dealing Under Copyright Law And Its Application To Podcasts”.

3.2.5 You Are Using Creative Commons-Licensed or “Podsafe” Content

Creative Commons’ licensed content is generally “podsafe” (i.e. is pre-cleared for use in podcasts) when your use is consistent with the applicable licence terms.

Creative Commons’ licences clearly signal to the public which uses you may make under the terms of the licence and which uses require separate and specific permission. This means that it is important to check the terms of the applicable Creative Commons licence to identify the relevant uses that are authorized in advance. Compliance with the terms of the Creative Commons licence is necessary because otherwise the licence terminates and then your use will become infringing.

If you use Creative Commons-licensed work in your podcast, you will need to provide attribution in the manner specified by the author and/or licensor. In addition, you must keep intact any copyright notices that accompany the work. Include the title of the work and any Uniform Resource Indicator provided by the licensor that also includes copyright or licensing information about the work. You also need to retain a notice or URL for the licence and the warranty disclaimer that applies to the work with each copy you make and distribute of it.

Briefly, the common Creative Commons licence conditions from Creative Commons core licensing suite may limit your use of a CC-licensed work in the following ways. The icons provided are standard Creative Commons icons representing the restrictions and they appear in the Creative Commons licence deeds:



NoDerivatives – This licence condition requires that any copy of the work you make is verbatim. In other words, you may not change the work. For example, you may not translate a textual work into another language or dramatize an existing work. You can, however, still include a NoDerivatives licensed work as part of another larger work (known as a “collective work”). For example, you can include several pieces of music together to form a collective work, as long as the work itself is unaltered. You cannot, however, mash up a NoDerivatives-licensed recording with another recording because that would constitute a derivative work. Note that the term “Derivative work”

comes from American copyright law and is not mentioned in Canadian law. The Canadian versions of the Creative Commons licences define the term “Derivative work” in terms found in Canadian law.²⁴



NonCommercial – This licence condition means that you cannot make money from the work. This means that you may not charge people money to download your podcast if you include a Creative Commons licensed piece of music that is NonCommercially licensed if the music is the primary draw and/or a substantial amount of the podcast. You also cannot include advertising before or after the piece of music or as part of the podcast if the work is the primary draw and/or a substantial amount of the podcast. An important thing to note about Creative Commons NonCommercially licensed content is that, under the licence, the licensor retains the right to collect royalties through statutory and voluntary collective rights management schemes for commercial uses of their content. In other words, if you are a for-profit podcaster you will likely still need to obtain the necessary permissions for your use of Creative Commons NonCommercially-licensed music. Learn more about music-related rights in Section 3.7 of this Guide – “Using Music”.



ShareAlike – This licence condition requires that if you make a derivative work of a Creative Commons licensed piece of content you license your own podcast under the same or similar Creative Commons licence terms. For example, if you take a Creative Commons licensed book and read it aloud as part of your podcast, your podcast must then be licensed under a Creative Commons licence that contains the same licence elements (such as Attribution, ShareAlike etc.) The ShareAlike requirement is not, however, viral: You can include a mash up of a ShareAlike licensed musical track (provided it is licensed under the same CC-licence terms) together with other tracks in a podcast to form a “collective work”, and you are not required to release the tracks that are not derived from the ShareAlike-licensed work under the same CC-licence terms.

If a Creative Commons licensed work is not licensed with one of these licence restrictions, you are then free to use the work in one of the above manners. For example, some content that is published under the Creative Commons Attribution licence may be used for commercial and noncommercial purposes and can be used verbatim or adapted and turned into derivative works, without those derivatives needing to be “shared-alike” (so long as attribution is given). A Creative Commons Attribution-NonCommercial licensed work can be used to make derivative works (so long as attribution is given and the work is used noncommercially). A Creative Commons Attribution-NoDerivatives licensed work can be used for commercial and noncommercial purposes (provided attribution is given and the work is used only verbatim), and so on.

One thing to note about Creative Commons licensed content generally is that all of the licences contain a disclaimer of warranties. This means that there is no assurance whatsoever that the licensor has all the necessary rights to permit reuse of the licensed work. (Note: this applies to version 2.0 licences and up; the version 1.0 CC licences included a warranty of title). The disclaimer means that the licensor is not guaranteeing anything about the work, including that she owns the copyright to it, or that she has cleared any uses of third-party content that her work may be based on or incorporate.

This is typical of so-called “open source” licences, where works are made widely and freely available for reuse at no charge. In open content licensing, warranties and indemnities are best determined separately by private bargain, so that each licensor and licensee can determine the appropriate allocation of risk and reward for their unique situation. One option thus would be to use private contract to obtain a warranty and indemnification from the licensor, although it is likely that the licensor would charge for this benefit.

As a result of the warranty disclaimer, before using a Creative Commons licensed work, you should satisfy yourself that the person has all the necessary rights to make the work available under a Creative Commons licence. You should know that if you are wrong, you could be liable for copyright infringement based on your use of the work.

Example: Ron starts distributing the new Barenaked Ladies album under a Creative Commons Attribution-only licence despite the fact that Ron does not have the authority from the Barenaked Ladies to do so. You copy it into your podcast (giving attribution as required by Ron’s licence). The Barenaked Ladies then sue you for copyright infringement. In this scenario, in the lawsuit you are liable directly to the Barenaked Ladies; you cannot make a claim against Ron for indemnification or breach of warranties on the terms of the Creative Commons licence. Of

course, Barenaked Ladies may sue Ron separately, but as to your own use of the album or songs in it, you will have to pay Barenaked Ladies without being able to make any contractual counter-claim against Ron.²⁵

You should learn about what rights need to be cleared and when a fair use or fair dealing defence may be available. It could be that the licensor is relying on the fair use or fair dealing doctrine but, depending on the circumstances, that legal defence may or may not actually protect her (or you). You should educate yourself about the various rights that may be implicated in a copyrighted work, because creative works often incorporate multiple elements such as, for example, underlying stories and characters, recorded sound and song lyrics. If the work contains recognizable third-party content, it may be advisable to independently verify that it has been authorized for reuse under a Creative Commons licence. In addition, you may need to think about what other rights may attach to the content you wish to use, such as trade-mark or publicity rights.

3.3 Special Rules For Librarians Or Teachers

It should be noted that there are special rules for using copyrighted works in the context of teaching and for libraries. In general, these rules allow for performance and display of certain copyrighted works in the face-to-face classroom setting. While there is a specific regime for distance learning in the US (under the “TEACH Act”), protection for educators in Canada appears limited to uses of works on the premises of the educational institution. Librarians also have special rights with respect to archiving, research and study. The details of these case-specific rules are beyond the scope of this Guide at this time. Suffice it to say that if you are using a podcast in a classroom setting (either face-to-face or through distance learning), or if you’re a librarian, you should look into these special rules. For further information see sections 29.4 to 30.4 of the *Copyright Act* (RSC 1985 c. C-42), <http://laws.justice.gc.ca/en/C-42/index.html> and check out the Canadian Library Association’s Copyright Resources website at <http://www.cla.ca/resources/copyright.htm>.

3.4 Using Your Own Written Content

If you create your own creative, expressive material for use in your podcast, you should, as a general rule, have no issues in terms of copyright clearances. If you are the creator of a sufficiently original work, then you will generally also be the first owner of copyright in that work once you have committed pen to paper, hit “save” or “record” and thus, able to exercise any and all of copyright’s exclusive rights as you choose.

It is, however, important to be aware that there are circumstances in which, even though you are the creator of a copyrighted work, you may not be the “author” or first owner of copyright. In Canada, there are three key exceptions to the rule that the author is the first owner of the copyright in a work: (i) employees paid to “create”; (ii) photographs and similar works; and (iii) works created at Her Majesty’s request. Additionally, you may not be the sole author or sole owner of copyright if you transferred or assigned your rights to someone else, or if you created a copyrighted work in collaboration with someone else.

In the employment context, the general rule is that the employer will be considered the first owner of the copyright in any work created by the employee in the regular course of their employment, unless there is an agreement to the contrary, or unless that employee is an independent contractor.²⁶ Sometimes it is not clear whether one is an employee or under a “contract of service” or an independent contractor under a “contract for service”. To help make that determination, courts will consider (1) the property of the tools, (2) control or direction (relationship of subordination), (3) whether the author assumes all or part of the business risk (loss or profit), and (4) the degree of integration of the author into the business of the “employer”.²⁷

In the context of photography, the situation is further complicated in two ways. First, the author of a photograph is the owner of the “plate” or the owner of the initial photograph when it was taken, and may not necessarily be the photographer. This is important because the term of copyright is calculated based on the author’s life, and moral rights are held by authors, not necessarily copyright owners. There is some discussion as to authorship of digital photographs which no longer require a plate. While it is argued that a technologically neutral interpretation of the Act would assign ownership to the owner of the memory stick of a digital camera, it is unclear how the rules in the Act apply to digital photographs. The other complicating factor for photographs is that if the photograph is

commissioned then the person who pays for it is by default the first owner of the copyright in the photograph, and is therefore the person who can give a license in the photograph.

The third situation where the creator of a work may not be the first owner of the copyright in that work is works that are created at Her Majesty's request. The general rule is that the government owns the copyright in these works. See the above section on Crown Copyright for more information.

Someone other than you can also become the copyright owner of your work by an express written agreement, signed by you, transferring ownership of the copyright.²⁸ Consequently, if you have signed away your rights to your work you may no longer be free to incorporate it in your podcast. Similarly, if you have given another party an exclusive licence to reproduce or perform your work, then you do not have the right to do so yourself.

Finally, where your work was done in collaboration with someone else and the parts are not distinct from each other, the rules of joint-authorship apply.²⁹ Where an agreement was signed between the joint authors, you will need to check the terms to see if you are able to freely exercise your rights as a joint author/owner and incorporate it into a podcast or whether you need the permission of your co-author. As a general rule, you must get the consent of all joint authors to use such works, to grant a licence for use. Where one or more of the joint authors is deceased, their rights will pass to their beneficiaries as opposed to the surviving authors. This means you may have to get consent from the beneficiaries.

3.5 Incorporating Pre-Existing Audio Voice Recordings

If you wish to incorporate pre-existing audio voice recordings that have been prepared by someone else, you need to think about both copyright and publicity rights issues. Copyright and the property right in one's voice are discussed here. For publicity rights, see the discussion in Section 2.3 of this Guide – “Why Are Publicity Rights Relevant?”.

With respect to audio recordings, there are potentially three layers of copyright that must be cleared before the recording can be used. To use an audio voice recording created by someone else, you need to make sure you have the necessary permissions to use both if you want to include it in your podcast. So for example, if the recording is Creative Commons licensed, you need to ensure that the licence applies to both the underlying work and the recording. The three rights that potentially exist in audio recordings are allocated as follows; the composer and/or lyricist has full protection under sections 3 and 14.1; as well, rights may exist for the performer in the performance of the music (singer or musician) and for the maker (producer) of the sound recording.³⁰

The performer, the person whose voice is the basis of the audio recording, has the sole right to communicate their work to the public by telecommunication. Since it has been held that transmission over the internet is a communication to the public by telecommunication,³¹ it is likely that the use of an audio recording in your podcast would implicate the performer's performance right.

Section 18 of the Copyright Act provides sound recording producers the right to reproduce their recordings in any material form, and to authorize such reproduction. Where the audio recording you wish to use in your podcast has been created by a record producer, permission from them will also be required.

Both performers and sound recording producers are entitled to equitable remuneration for the performance or communication to the public of their audio recordings.³² This is usually achieved through collective administration of copyright royalties.

Copyright protection of the recording as a general rule means that a person cannot, without the express permission of the copyright owner, duplicate or rearrange the actual sounds that make up the recording. Even taking a small amount of the original sounds may implicate a copyright right. Consequently, even minor reproduction or arrangements require express permission of the copyright owner.

This does not prevent a person, however, from creating a new recording of independently fixed sounds, even if the end result sounds the same as a pre-existing copyrighted recording – but copyright in the underlying work may still need to be cleared. So, for example, if you come across a recording of a person reading aloud a chapter of a recently

published book, you can record yourself reading that chapter aloud without infringing the first person's copyright in their *recording*; but you may need to get permission to use the *book chapter* from the book's author or copyright owner. (Note that permission to record the book chapter should not be necessary if the book is in the public domain.)

In Canada, there is also a tort of misappropriation of personality. See Section 2.3 of this Guide for more information.

3.6 Interviewing Someone Or Asking Someone To Join You In Conversation As Part Of Your Podcast

If you interview someone for your podcast, you need to consider both copyright and publicity rights issues. For publicity rights, see the discussion in Section 2.3 of this Guide – “Why Are Publicity Rights Relevant?”.

Under the law of copyright there may be two different owners of copyright in one interview – you as the interviewer and the interviewee in their response to your questions – depending on how the interview is presented.

In general, because a work must be fixed before it can be protected by copyright, an interviewee will not own copyright in their verbatim responses.³³ As the interviewer, if you write down the interview, you will own the copyright, subject to meeting the originality requirements for copyright protection. In addition, if you record the interview, you will own the copyright in the sound recording as per s.18 of the Copyright Act. As an interviewer, you may also own copyright in the overall compilation of an interview that incorporates different answers to multiple interviewees.

The basic rule for copyright in interviews depends on the efforts undertaken by the interviewer. If you engage your interviewee in a chain of questions and answers that follow a logical pattern or train of thought, this may be viewed as “non-trivial, non-mechanical skill, labour and judgment” and may thus meet the requirements for originality, giving you the copyright in the interview.³⁴

However, as an interviewer, you should make sure the interviewee agrees to the interview, to your adaptation of their responses (assuming you intend to adapt them) and to the inclusion of their responses in your podcast and the circulation of your podcast on the terms you choose. In many interview scenarios you may have an implied licence to use the materials, but it safest to get your interviewee's written consent or (at minimum) record the interviewee's verbal consent before you use the interview in your podcasts. (See discussion about the legal terms on which you can distribute your podcast in Section 4 of this Guide – “Legal Issues Surrounding How You Distribute Your Podcast”).

3.7 Using Music

Using music in your podcast opens up many specific copyright issues that we will address in this section. If the music you use is created by someone else and does not fall within one of the 5 types of content for which you don't need permission (see Section 3.2 – “The Good News: 5 Instances Where Permission Is Not Required”), then these rules will apply to your use of that music. If you write and/or record all of the music you wish to use in your podcast, then you should consider the issues outlined in Section 3.4 of this Guide (“Using Your Own Written Content”) to make sure you own the rights to your music. If you do, you should be able to include it in your podcast without having to traverse the issues laid out in this section.

3.7.1 Layers of Copyright in Music

Copyright law in Canada is complex. It consists of several layers of rights for several owners of copyright in a work. There are three copyrightable aspects to a song: the musical composition, the performance, and the sound recording. A copyright in a musical composition encompasses a song's music and lyrics. It can be helpful to think of this work as what would appear in a sheet music arrangement of the song (the notes, score, markings, etc.). Copyright protects compositions from the moment a songwriter fixes the work in a tangible medium, such as writing the sheet music or by hitting “save” in a software program that creates music. A copyright in a performance protects the performer's performance and all the unique aspects of their individual performance of a song. A copyright in the sound recording

protects the recording of a musical composition as it was performed and recorded by an artist or group. Think of this work as what you would actually hear when you play your favourite CD: the singer's voice, the sound of the musical instruments, and all of the engineering that goes into making the recording.

For each of these aspects of a song, there are two main rights implicated in copyright law as it pertains to music: the reproduction right and the performance right. The reproduction right involves making copies of a musical work. In contrast, the performance right addresses making music, a performance of music or a recording of music available to the public either through performance or telecommunication. The term "mechanical" right is often used interchangeably with "reproduction" right and is implicated in much the same way, except that the copies involve manufacturing a new version (like pressing a new CD) as opposed to making a simple copy (like a basic photocopy of sheet music).

Since there are three copyrightable aspects to music, there are also at least three main owners of copyright in a song: the songwriter, the performer, and the sound recording maker. The songwriter refers to any lyricist or composer who worked on the original creation of the song. This could be just one person or it could be a group of people, as in the case of joint authorship. Songwriters derive their rights from section 3(1) of the *Copyright Act*, which grants them an exclusive right to produce or reproduce, and to perform the work. Songwriters often wholly or partially assign their copyright to music publishers. These music publishers often work with collectives to ensure royalties are paid. The collectives that represent songwriters and music publishers are SODRAC, CMRRA, and SOCAN.

The performer refers to anyone who contributes to the performance of a musical work, including the singer and all the band members. Some collectives that represent performers are AVLA and NRCC. Performers derive their rights from section 15(1) of the *Copyright Act*, which grants them exclusive rights in their performance, including the sole right to communicate to the public, perform or fix any of their performances, as well as to reproduce any fixation of the performance. Performers are also granted a right of equitable remuneration by section 19(1), which enables them to be paid equally with the sound recording maker for any communication of their works by telecommunication.

The sound recording maker refers to the person who undertakes the arrangements necessary for the first fixation of the sounds.³⁵ This is usually a record label. The major record labels are represented by the Canadian Recording Industry Association (CRIA) while many independent labels are represented by the Canadian Independent Record Production Association (CIRPA). The collectives that represent the copyrights for sound recording makers are AVLA for reproduction, and NRCC for performance. Sound recording makers derive their rights from section 18(1) of the *Copyright Act*, which grants them the exclusive right to reproduce their sound recordings, as well as to publish or rent them out. Sound recording makers are also granted a right of equitable remuneration by section 19(1), which enables them to be paid equally with the performers maker for any communication of their works by telecommunication.

Many different uses of music are licensed through collectives in exchange for payment of a tariff established by the Copyright Board. Online use of music is currently being contemplated by the Board, which recently released its reproduction rights decision (CSI Online Music Services Tariff) and is currently drafting a performing rights decision (SOCAN Tariff 22). Of these, SOCAN Tariff 22 is expected to expressly contemplate podcasting, so the exact rates to be paid for use of music in a podcast remain to be determined.

The following section seeks to clarify the relationship between the different copyright owners and layers of rights. While neither the reproduction rights collectives nor the performing rights collectives currently issue licences for podcasts, you should be able to clear the rights for the different elements you wish to incorporate into your podcast by following the steps set out below.

Who are the copyright collectives?

SOCAN = Society of Composers, Authors and Music Publishers of Canada
www.socan.ca

CMRRA = Canadian Musical Reproduction Rights Agency
www.cmrra.ca

SODRAC = Society for Reproduction Rights of Authors, Composers and Publishers in Canada
www.sodrac.ca

NRCC = Neighbouring Rights Collective of Canada
www.nrdv.ca

AVLA = Audio Video Licensing Agency
www.avla.ca

CSI = CMRRA-SODRAC Inc.

3.7.2 Copyright Matrix

This chart is a visual representation of the layers of copyright protection in the context of music. It is important to keep in mind that these categories may be artificially constructed, as the songwriter and the performer are often the same person. Similarly, if someone writes their own music, sings their own songs, and owns a recording studio, all three categories may refer to the same person! It is also important to remember that these rights are often layered on top of each other such that an activity that infringes the rights of the sound recording maker will probably also infringe the rights of the performer and the songwriter. Examples of each of the rights have been provided to help illustrate their contents, but there are many types of activities that may fall into each category.

	Songwriter Lyricist and/or composer	Performer Singer, band members	Sound Recording Maker Record labels
	<p><i>May retain or waive moral rights</i></p> <p><i>May assign both reproduction and performance rights to a music publisher</i></p> <p><i>May assign mechanical right to SODRAC</i></p> <p><i>May enter into non-exclusive agency agreement with CMRRA regarding reproduction rights</i></p> <p><i>May assign performance rights to SOCAN</i></p>	<p><i>May assign performance rights and/or fixation rights to the sound recording maker</i></p>	<p><i>May enter into non-exclusive agency agreement with AVLA regarding reproduction rights</i></p> <p><i>May enter into non-exclusive agency agreement with collectives who are members of NRCC regarding performance rights for communication to the public by telecommunication any sound recording</i></p>
Reproduction Right SODRAC, CMRRA, AVLA	<ul style="list-style-type: none"> • Copying sheet music • Posting lyrics online • Uploading a ringtone 	<ul style="list-style-type: none"> • Making a bootleg recording of a concert 	<ul style="list-style-type: none"> • Ripping a CD or music DVD • Sharing mp3s
Performance Right SOCAN, NRCC	<ul style="list-style-type: none"> • Singing a cover song • Busking • Webcasting/podcasting music 	<ul style="list-style-type: none"> • Transmitting a live performance by radio, tv, or internet • Playing a live transmission in a public place • Recording a live performance 	<ul style="list-style-type: none"> • Playing a CD in public

3.8 Rights Clearance by Content

3.8.1 Using Your Own Music (that you wrote and composed)

If you choose to use music that you composed in your podcasts there are usually no rights to clear since you are the copyright owner. If, however, you have transferred some or all of your rights to one of the copyright collectives, you should review your contract or check with them directly to ensure you have permission to use the work in your podcast.

3.8.2 Using Creative Commons Licensed Music

If you choose to use music that is licensed through Creative Commons, as long as you follow the parameters of the licence, there are no additional rights to clear. There is a great deal of podsafe content available online and licensed under Creative Commons licences. See Section 3.12, “Finding “Podsafe” Content To Include In Your Podcasts” to help you find content for your podcast.

3.8.3 Using Your Own Recording of Your Own Performance Of Another Person’s Song (if you perform a cover song)

If you choose to include your own recording of your own performance of another person’s song, you will implicate the reproduction rights and the performance rights of the songwriter. You will have to follow these steps to ensure the rights are cleared.

(1) Reproduction rights of songwriter – contact SODRAC and CMRRA to determine if the song you wish to perform in your podcast is in their repertoire. If it’s not, you will need to contact the songwriter directly to gain permission. If the song is in their repertoire, you can obtain a mechanical licence to record the work in exchange for payment.

(2) Performance rights of the songwriter – contact SOCAN to determine if the song you wish to perform in your podcast is in their repertoire. If it’s not, you will need to contact the songwriter or music publisher directly to gain permission. If the song is in the repertoire, you can obtain a licence to communicate your recording of your performance of the work in exchange for payment.

If you cannot locate the owners of the copyright through the collectives, and you can demonstrate that you made a reasonable effort to do so, you can apply to the Copyright Board for a licence to use the work of an unlocatable copyright owner under section 77 of the Copyright Act.

3.8.4 Using Your Own Recording Of Another Person’s Performance of Another Person’s Song (if you record a song from the radio)

If you choose to include your own recording of another person’s performance of another person’s song, you will implicate both the reproduction rights and performance rights of the performer, as well as the reproduction and performance rights of the songwriter. You will have to follow these steps to ensure the rights are cleared.

To clear the reproduction and performance rights of the songwriter, follow the steps laid out in Section 3.8.3.

(1) Reproduction rights of the performer – contact AVLA to determine if the song you wish to record for your podcast is in their repertoire. If it’s not, you will need to contact the performer directly to gain permission. If the song is in the repertoire, you can obtain a licence to record the performance in exchange for payment.

(2) Performance rights of the performer – contact the Copyright Board to determine if a tariff has been filed in respect of your desired use of the music. Where there is a tariff, you can use the music in exchange for payment. Where there is no tariff, you are free to use the music in your podcast.

If you cannot locate the owners of the copyright through the collectives, and you can demonstrate that you made a reasonable effort to do so, you can apply to the Copyright Board for a licence to use the work of an unlocatable copyright owner under section 77 of the Copyright Act.

3.8.5 Using A Pre-Recorded Version Of A Song (any song from a CD or a download)

If you choose to include a pre-recorded version of a song, you will implicate the reproduction and performance rights of the songwriter, the performer, and the sound recording maker. You will have to follow these steps to ensure the rights are cleared.

To clear the reproduction and performance rights of the songwriter, follow the steps laid out in Section 3.8.3.

To clear the reproduction and performance rights of the performer, follow the steps laid out in Section 3.8.4.

(1) Reproduction rights of the sound recording maker – contact AVLA to determine if the song you wish to use in your podcast is in their repertoire. If the song is in the repertoire, you can obtain a licence to copy the recording in exchange for payment. If it's not, you will need to contact the label directly to gain permission.

(2) Performance rights of the sound recording maker – because performers and sound recording makers are entitled to equitable remuneration for the performance of their works, if a tariff exists for your desired use of the recording you must pay it. To do so, contact the Copyright Board, as per section 3.4(2) above.

If you cannot locate the owners of the copyright through the collectives, and you can demonstrate that you made a reasonable effort to do so, you can apply to the Copyright Board for a licence to use the work of an unlocatable copyright owner under section 77 of the Copyright Act.

3.8.6 Using Pre-Recorded Song/Video Together

If you choose to include a pre-recorded version of a song with a pre-recorded video, you will implicate the reproduction and performance rights of the songwriter, the performer, and the sound recording maker. There are special licences the synchronization of audio and video content. You will have to follow these steps to ensure the rights are cleared.

To clear the reproduction and performance rights of the songwriter, follow the steps laid out in Section 3.8.3.

To clear the reproduction and performance rights of the performer, follow the steps laid out in Section 3.8.4.

To clear the reproduction and performance rights of the sound recording maker, follow the steps laid out in Section 3.8.5.

To secure a synchronization licence for the reproduction of the music, contact CMRRA for a synchronization licence. This is a form of mechanical licence that will allow you to combine audio and video from works that are within CMRRA's repertoire. You may also need to contact other collectives to secure the synchronization rights for the reproduction of the performance and the sound recording as well.

If you cannot locate the owners of the copyright through the collectives, and you can demonstrate that you made a reasonable effort to do so, you can apply to the Copyright Board for a licence to use the work of an unlocatable copyright owner under section 77 of the Copyright Act.

3.9 Rights Clearance Flow Chart

		Using Your Own Music	Using Creative Commons Licensed Music	Using Your Own Recording of Your Own Performance of Another Person's Song	Using Your Own Recording of Another Person's Performance of Another Person's Song	Using a Pre-Recorded Version of a Song	Using a Pre-Recorded Song/Video Together
Songwriter's Rights	Reproduction	X	X	a	a	a	a
	Performance	X	X	a	a	a	a
Performer's Rights	Reproduction	X	X	x	a	a	a
	Performance	X	X	x	a	a	a
Sound Recording Maker's Rights	Reproduction	X	X	x	x	a	a
	Performance	X	X	x	x	a	a
All Owners of Reproduction Rights	Synchronization Licences	X	X	X	X	X	a

3.10 Using Video/Images

If you are interested in video podcasting, vlogging or otherwise including images or video with your podcast, you need to think about potential copyright issues and publicity issues. For publicity rights, see the discussion in Section 2.3 – “Why Are Publicity Rights Relevant?” You could also generally consult the EFF Legal Guide for Bloggers if the content of your video podcast will likely touch on issues relevant to defamation, election and labour laws or adult material: (<http://www.eff.org/bloggers/lg/>) or check out CIPPIC’s FAQs on defamation (<http://www.cippic.ca/en/faqs-resources/defamation/>) and on internet censorship (<http://www.cippic.ca/en/faqs-resources/internet-censorship-public-libraries/>).

With respect to copyright, the issues that arise are similar to those that arise in relation to the use of text or music except that there are more of them because a greater number of copyrighted works may be included in an image or video. You need to isolate and think about each type of work that may be included in an image or video and identify whether you need to clear each of those works. For example, you will need to identify each piece of music you use and any still images or video footage created by other people and consider whether copyright applies and if so, whether your use requires the copyright owner’s permission or whether your use falls within an exception to copyright. Using music together with images in a video podcast also raises special licensing issues. These are addressed in Section 3.10 – “Using Video/Images”.

There is one final thing to consider that is not addressed above. Although architects have no right under copyright law to prevent a public building from being photographed or sketched, you may want to think before including other artwork in your video or image collage and go through the exercise of identifying whether your use likely constitutes a fair dealing or whether separate permission is needed.

3.11 Fair Dealing Under Copyright Law And Its Application To Podcasts

A “fair dealing” is copying a substantial part of any protected material (texts, sounds, images, etc.) for one of only 5 limited purposes, namely research or private study, criticism, review, or news reporting. Under Canadian copyright laws, fair dealing is considered a “user’s right.”³⁶ It is more narrowly construed than “fair use” in the US. While there is no set test for fair dealing, judges typically consider six factors that are set forth in *CCH v. LSUC* to provide a “useful analytical framework to govern determinations of fairness.”³⁷ These include:

- a) the purpose of the dealing;
- b) the character of the dealing;
- c) the amount of the dealing;
- d) alternatives to the dealing;

- e) the nature of the work; and
- f) the effect of the dealing on the work.

a) Purpose

In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the Act – research, private study, criticism, review or news reporting.³⁸ “Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.”³⁹

b) Character

In assessing the character of a dealing, courts will examine how the works were dealt with. According to the Court in *CCH*,

“If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”⁴⁰

c) Amount

The quantity of the work taken will not be determinative of fairness, but it can help in the determination.⁴¹ The amount taken may also be more or less fair depending on the purpose.

d) Alternatives

Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court,⁴² and a determination of whether the activity was “reasonably necessary” should also be made.

e) Nature

The nature of the work in question should also be considered by courts assessing whether a dealing is fair. “Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”⁴³

f) Effect

Finally, the effect of the dealing on the work is another factor warranting consideration when determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.⁴⁴ This factor must also be considered with close attention to the details of the specific fact situation, as the amount of copyrighted work used and the way in which it is used could influence the effect the activity has on the original work, and subsequently, whether or not the activity is fair.

Finally, fair dealing for the purposes of criticism, review, or news summary requires one to mention the source and, if given in the source, the author.

3.11.1 Two Misconceptions About Fair Dealing

(a) **Acknowledgement Is Not Enough.** Some authors have the erroneous belief that an acknowledgement will immunize a copyright infringement as “fair dealing.” This is a myth. Including an acknowledgement may be considered in analyzing the six factors, but it is by no means a clear defence to a claim of infringement.

(b) **Disclaimers Are Not Enough Either.** Another point of confusion is whether an upfront disclaimer that denies any association between the podcast and the copyrighted material can protect the podcaster from liability. For example, assume your podcast is a parody of the “Corner Gas” television show. You include a disclaimer at the beginning of your podcast in which you state: “This podcast is not associated with or endorsed by CTV.” This sort of disclaimer will not, by itself, protect you from a claim of copyright infringement, or act as a clear defence to such a claim. It will, however, be considered among the factors the court considers, and in a very close case, a court may look positively on a clear statement of disassociation. (Note, however, that including a clear disclaimer can help with potential trade-mark infringement situations. See Section 2.4 of this Guide, “How Is Trade-mark Law Relevant?”, for further information about trade-mark law.)

For more information about fair dealing and the differences between Canadian and US copyright law exceptions, see the Canadian Internet Policy and Public Interest Clinic (CIPPIC)’s Copyright Law FAQ at <http://www.cippic.ca/en/faqs-resources/copyright-law/>.

3.11.2 Examples Of Fair Dealing That May Apply In Podcasting

To help illustrate the way these factors may play out in the podcasting context, it may help to consider a few examples:

Example 1: A book group organized by a high school teacher podcasts its meeting discussing J.D. Salinger’s *Catcher In The Rye*. The members discuss the book, read short portions of it aloud, and criticize and comment on the author’s style, the storylines, and the like. The podcast is posted on the book group’s blog site, which is hosted by the high school. The site includes no advertising and generates no revenue. Conclusion: This would likely be fair dealing.

Example 2: A podcaster uses the copyrighted music of pianist George Winston for the intros and outros of her podcast that is about yoga and meditation. The podcast has nothing to do with commenting or critiquing the music played. Conclusion: This is likely not fair dealing.

Example 3: A 10-minute podcast includes a group of music fans discussing a recent copyrighted article in Rolling Stone magazine about a new band. One fan reads 4 paragraphs of the 6-paragraph article and comments on its analysis of the band. Another fan plays a 1-minute segment of the band’s copyrighted song, which is 2 minutes in length. The fan then discusses the music as it compares to other music in the genre. The fans post the podcast on a fan website where advertising is sold, and the fans receive revenue for their podcast. Conclusion: This commentary/criticism by the fans in response to the article and song suggests “fair dealing”, but the commercial/profit aspect of the site where the podcast is being distributed raises concern, as does the amount of the article and song taken in comparison to their overall length. Any negative effect on Rolling Stone magazine’s market or the band’s market for its music could cut against the fair dealing argument, though the podcasters might argue that the podcast promotes the Rolling Stone magazine article and band’s song, and that the podcast is not a replacement for either (of course, this would likely be costly and difficult to prove in a trial setting). Given the flexible application of the fair dealing doctrine, and that the burden lies on the podcaster to prove fair dealing, podcasters in this situation could be found to infringe.

3.12 Finding “Podsafe” Content To Include In Your Podcasts

Finding good content to use in your podcast and individually negotiating permission to use it can be a time-consuming task and may also be daunting if you are unsure if the rights-holder will agree to authorize the use of their content in your podcast.

One way to reduce the time and hassle of individually seeking permission from each rights-holder is to search for Creative Commons licensed material. CC-licensed material is “pre-cleared” for use in accordance with the terms of the applicable Creative Commons licence. We explain at Section 3.8.2 – “Using Creative Commons Licensed Music” – about the different types of Creative Commons licences. Below we explain how you can find and identify CC-licensed content that you may be able to use in your podcast.

3.12.1 Finding CC-Licensed Materials

Creative Commons licences are expressed in three formats: the human readable summary of the key terms (Commons Deed); the actual licence (Legal Code); and, finally Resource Description Framework metadata that describes the key licence elements in machine-readable format.

You can identify Creative Commons licensed content in two ways: either by looking for a human-readable statement that a piece of content is licensed under a Creative Commons licence. This can include, for example a statement to the following effect:

“This work is licensed under a Creative Commons Attribution 2.5 licence
<http://creativecommons.org/licenses/by/2.5/>”;

And/or this may be indicated by the use of one of the Creative Commons licence buttons. The licence buttons indicate what licence they point to by displaying the use restriction icons. To give you an idea of what this means, here are a few of the licence buttons:



You can use the search engine on the Creative Commons website to find content licensed under Creative Commons licences. You can find the search engine at <http://search.creativecommons.org/>, where you can search for content on Google, Yahoo!, flickr, blip.tv, and other online services. You can also find Creative Commons licensed content through the customized Yahoo! and Google searches that are available in the “Advanced Search” pages for both search engines. The Yahoo! Advanced search (<http://search.yahoo.com/search/options>) page clearly illustrates how you can limit your search results to Creative Commons-licensed works. In the Google Advanced Search page (http://www.google.com/advanced_search), by limiting your search according to “Usage Rights”, this will restrict your searching to find CC-licensed materials only.

There are also various content aggregator sites that offer a large amount of Creative Commons licensed works. These are listed at this page: http://wiki.creativecommons.org/wiki/Content_Curators.

One thing to note about Creative Commons licensed content generally: you should be aware that all of the licences contain a disclaimer of warranties, so there is no assurance whatsoever that the licensor has all the necessary rights to permit reuse of the licensed work. (Note: this applies to version 2.0 licences and up; the version 1.0 CC licences included a warranty of title). The disclaimer means that the licensor is not guaranteeing anything about the work, including that she owns the copyright to it, or that she has cleared any uses of third-party content that her work may be based on or incorporate.

This means that you should satisfy yourself that the person has all the necessary rights to make the work available under a Creative Commons licence. You should know that if you are wrong, you could be liable for copyright infringement based on your use of the work.

You should learn about what rights need to be cleared (such as for example publicity rights) and when a fair use or fair dealing defence may be available. It could be that the licensor is relying on the fair use or fair dealing doctrine, but depending on the circumstances, that legal defence may or may not actually protect her (or you). You should educate yourself about the various rights that may be implicated in a copyrighted work, because creative works often incorporate multiple elements such as, for example, underlying stories and characters, recorded sound and song

lyrics. If the work contains recognizable third-party content, it may be advisable to independently verify that it has been authorized for reuse under a Creative Commons licence.

3.12.2 Other Sites That Offer Podsafe Content

See Section 5 of this Guide, “Background and Further Resources”, for a listing of podsafe content providers.

4 Legal Issues Surrounding How You Distribute Your Podcast

You may license your work through either an “implied” or an “express” licence. An “implied licence” in copyright is a licence created by law based on the circumstances that surround how the work is made available when there is no actual agreement between you and the licensee. An implied licence is usually merely a licence to use the work and does not confer an interest in it. An “express licence” means you have expressly stated the terms of the licence in some written form. An express licence may involve merely permitting use of your work, or could take the form of a Creative Commons licence, or could involve the sole or exclusive assignment or transfer of either the whole copyright or partial rights, and must be in writing.⁴⁵ The only right that cannot be assigned is the moral rights associated with the work, though those rights can be waived.⁴⁶

4.1 Implied Licences

An implied licence might occur when your actions indicate that you (the copyright owner) extended a licence to those using your podcast, but you never created a written licence. In an implied licence, you may never have agreed on specific terms of the licence. The purpose of an implied licence is to allow the licensee (the party who is using your podcast) some right to use the podcast, but only to the extent that you would have allowed had you negotiated an actual agreement. Generally, the custom and practice of the community are used to determine the scope of the implied licence. There are no clear definitions or established legal rules to handle the situation of an implied copyright licence in all cases, especially as it relates to new technology like podcasting.

Because implied licences leave many open questions about copyrights, it’s best to be express about the terms under which you wish to license your podcast. Specific options to consider for express licences are discussed in the next section, Section 4.2 – “Express Licences”.

4.2 Express Licences

You have many options in terms of the exact type of express licence you choose to apply to your podcast. If you are a lawyer or know a lawyer, they can generally prepare a licence or terms of use that reflect your specific preferences as to how other people use your podcast. Below, we mention two of the currently most common forms of express licensing for podcasts – a Creative Commons licence and an “all rights reserved” model.

4.2.1 Applying A CC Licence To Your Podcast

Before you apply a Creative Commons licence to your podcast, you first need to consider the legal issues outlined in this Guide. You can only apply a Creative Commons licence to your podcast if you are the creator of all of the materials included in your podcast or if you have the express permission of the creator or copyright owner of materials included in your podcast to license their materials under a Creative Commons licence. It is possible for example, to apply a Creative Commons licence to some elements of your podcast (e.g. your interviews and general talking) but not others (e.g. third party music to which you only have a limited licence). In that case, it is important that you clearly identify which components of your podcast are under a Creative Commons licence and which parts are not. In addition, this page provides you with an overview of some of the issues you may wish to think about before you apply a Creative Commons licence to your podcast: <http://creativecommons.org/about/think>.

Some of the benefits of applying a CC licence to your podcast are that it can help to clearly indicate and clarify the permitted terms of use to your listeners, for example, whether you are happy for them to mashup your podcast or not; and also, if you include the Creative Commons metadata, your podcast can be readily found through Yahoo! and Google customized CC-searches if incorporated properly.

Creative Commons metadata can be incorporated in a podcast in one or all of three different locations:

- Incorporation in the webpage(s) that host the podcast. This will enable uses of the Yahoo! and Google Creative Commons-customized search and other CC-enabled search engines to discover your podcast.
- Incorporation in the podcast syndication feed(s), which will enable those services that are eager to promote curated and fully legal audio feeds, of which there are many, to do so.
- Embedding in the podcast mp3 files. This practice, outlined at <http://creativecommons.org/technology/embedding>, allows users of CC-enabled filesharing programs such as LimeWire and Morpheus to find and spread legal content.

Since the Canadian versions of the Creative Commons licences are drafted to be most effective in the Canadian legal environment, you are encouraged to select Canada as your jurisdiction when you select licences.

4.2.2 Using the “All Rights Reserved” Model For Your Podcast

In Canada, copyright protection is automatic. This means that you do not need to register your work with the Canadian Intellectual Property Office (CIPO) and you do not need to mark it with the © symbol. However, if you do register your copyright with CIPO, it will be useful evidence if you think that someone has infringed your copyright. See CIPO’s Copyright FAQ for more information about the benefits of registering your copyright: http://strategis.gc.ca/sc_mrksv/cipo/cp/faq_cp-e.html#7.

As licences go, of course, “All Rights Reserved” is not a licence at all. It is a clear indication to your audience that, while you are distributing your work, you choose not to allow others to copy it, distribute it or perform it. Note, however, that a work that is marked “All Rights Reserved” can also be licensed out on other terms. That is, you can put an “All Rights Reserved” notice on your podcast but then sell a licence to an organization so they can distribute it under the terms of that licence.

5 Background and Further Resources

This section of the Guide offers some resources you may find helpful. By including these resources here, we do not “endorse” them, but hope that you find these to be useful places to get more information. There is, of course, a wealth of information in addition to these resources, and this is not intended to be an exhaustive list at all. Many other resources are available online and in your local library or bookstore.

5.1 Search Engines And Directories For Podcasts

<http://www.canadapodcasts.ca/>

<http://www.canadianpodcastbuffet.ca/>

5.2 Finding Podsafe Content

<http://creativecommons.ca>

<http://creativecommons.org/>

<http://www.audiofeeds.org/>

<http://music.podshow.com/> (the podsafe music network)

<http://www.podsafeaudio.com/>

5.3 Websites With Legal Information On The Issues In This Guide

<http://creativecommons.ca>

<http://www.creativecommons.org>

http://strategis.gc.ca/sc_mrksv/cipo/welcome/welcom-e.html

<http://www.cippic.ca/en/>

<http://cyberlaw.stanford.edu>

<http://www.eff.org>

6 Endnotes

¹ The definition of “musical work” was changed in 1993 to “any work of music or musical composition, with or without words.” Gervais and Judge note “while the fixation requirement isn’t expressly excluded, this seems to be the intended result.” In addition, under s. 15(1) a performer’s performance of music is specifically protected even if unfixed. See Daniel Gervais and Elizabeth F. Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson Carswell, 2005) at p.15 [*Gervais and Judge*].

² *Copyright Act*, R.S.C. 1985 c. C-42, <<http://laws.justice.gc.ca/en/C-42/index.html>>, s. 3(1).

³ Gervais and Judge, *supra* note 1 at 581.

⁴ *Krouse v. Chrysler Canada Ltd.* (1973), 1 OR (2d) 225, 40 DLR (3d) 15; *Athans v. Canadian Adventure Camps Ltd.* (1997), 17 OR (2d) 425, 80 DLR (3d) 583. “His (Lederman J in *Gould, below*) cautious conclusion was that although the *Athans* court imposed liability in the absence of a finding of endorsement, “it would seem open to the court to conclude, on a contextual basis, that the tort of appropriation of personality, is restricted to endorsement-type situations.” Mitchell A. Flagg, “Star Crazy: Keeping The Right Of Publicity Out Of Canadian Law” (1999) Ad IDEM <<http://www.adidem.org/articles/MF1.html>> at 23.

⁵ *Gould Estate v. Stoddart Publishing Co.* [1998] 39 OR (3d) 545

<<http://www.canlii.org/en/onca/doc/1998/1998canlii5513/1998canlii5513.html>> [*Gould Estate*].

⁶ Gervais and Judge, *supra* note 1 at p. 285.

⁷ *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120.

⁸ Black’s Law Dictionary, 8th Ed. *Goodwill* at p. 715.

⁹ *Trade-marks Act*, R.S.C. 1985, c. T-13, <<http://laws.justice.gc.ca/en/T-13>>.

¹⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339,

<<http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>> at paras. 16, 25, and 88 [*CCH v. LSUC*].

¹¹ Gervais and Judge, *supra* note 1 at p. 50, citing *Breen v. Hancock House Publishers Ltd.* (1985), [1985] F.C.J. No. 957, 6 CPR (3d) 433, 6 CIPR 129, and *Canadian Performing Right Society Ltd. v. Canadian National Exhibition Assn.*, [1934] OR 610 (Ont. H.C.)

¹² “Does the Copyright Office check to ensure my claim of copyright is legitimate?” Canadian Intellectual Property Office, FAQ, <http://strategis.gc.ca/sc_mrksv/cipo/cp_faq_cp-e.html#2>.

¹³ Gervais and Judge, *supra* note 1, p. 15-6, citing *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 U.N.T.S. 299, <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

¹⁴ Gervais and Judge, *supra* note 1 p. 16.

¹⁵ *Copyright Act*, *supra* note 2 at s.6.

¹⁶ *Copyright Act*, *supra* note 2 at s.9(1).

¹⁷ Normand Tamaro, The 2006 Annotated Copyright Act (Toronto: Thomson Carswell, 2006) at p. 356.

¹⁸ The only exception to this is in the context of photographic works. In that case, if a photograph is made in the course of employment, the employer can be the original owner and the term of copyright is just 50 years from the date of creation.

¹⁹ *Copyright Act*, *supra* note 2 at ss.6.1 and 6.2.

²⁰ Wanda Noel, “Copyright Protection in Unpublished Works: Final Report” <http://www.cla.ca/resources/23april2002.pdf>.

²¹ Normand Tamaro, *supra* note 17 at p. 324.

²² Gervais and Judge, *supra* note 1 at p. 44.

²³ You may note that in the discussion of works in the public domain, reference was made to a “contract of service”, which refers to an Employment relationship. In general, the phrase “contract of service” refers to an employment situation, while “contract for service” refers to a contractual arrangement.

²⁴ Version 3.0 of the Canadian Creative Commons licences are expected not to use the term “Derivative Work” in preference for the term “Adaptation”

²⁵ None of which is to suggest that BNL would be involved in such a lawsuit in the first place! In fact, the Barenaked Ladies have been very progressive in their use of social media and user generated content.

²⁶ This protection is found in s.13(3) of the *Copyright Act*, *supra* note 2.

²⁷ Gervais and Judge, *supra* note 1 at p. 40.

²⁸ *Copyright Act*, *supra* note 2 at s. 13(4). See also *Motel 6 Inc v. No. 6 Motel Ltd.* (1981), [1982] 1 FC 638, 127 DLR (3d) 267; and Gervais and Judge, *supra* note 1 at p. 46.

²⁹ *Copyright Act*, *supra* note 2 at ss. 2, 6.2, 7 and 9. See also Gervais and Judge, *supra* note 1 at p. 44-5.

³⁰ Gervais and Judge, *supra* note 1 at p. 32.

³¹ Normand Tamaro, *supra* note 17 at p. 412; *CAIP v. SOCAN*, 2004 SCC 45, <<http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>> [*Tariff 22*].

³² *Copyright Act*, *supra* note 2 at ss. 19(1) and (2).

³³ In *Gould Estate*, *supra* note 5, the Ontario Court of Appeal held that oral statements made by Gould during an interview could not be protected by copyright because there was no fixation. See also, Gervais and Judge, *supra* note 1 at pp. 14-15.

³⁴ Gervais and Judge, *supra* note 1 at p. 38-9.

³⁵ *Copyright Act*, *supra* note 2 at s.2.

³⁶ *CCH v. LSUC*, *supra* note 10 at para. 48.

³⁷ *Ibid* at para. 53.

³⁸ *Ibid* at para. 54.

³⁹ *Ibid* at para. 63.

⁴⁰ *Ibid* at para. 55.

⁴¹ *Ibid* at para. 56.

⁴² *Ibid* at para. 57.

⁴³ *Ibid* at para. 58.

⁴⁴ *Ibid* at para. 59.

⁴⁵ *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, 2006 SCC 43,

<<http://scc.lexum.umontreal.ca/en/2006/2006scc43/2006scc43.html>>.

⁴⁶ Gervais and Judge, *supra* note 1 at pp.46-7.