

TABLE OF CONTENTS

Dedication	iii
Preface and Acknowledgements.....	v
Table of Cases	xvii
Chapter 1—Copyright: The Who, What, Where, When and How.....	1
1.1 WHAT COPYRIGHT IS	7
1.1.1 Overview.....	7
1.1.2 Introduction to Copyright.....	8
1.2 WHAT LAW GOVERNS COPYRIGHT	11
1.2.1 History of Copyright Law	11
1.2.1.1 Canadian Legislation.....	12
1.2.2 Legislative Basis	13
1.2.3 Domestic Law	14
1.2.3.1 Copyright Legislation.....	14
1.2.3.1.1 Copyright Act	14
1.2.3.1.2 Copyright Regulations	14
1.2.3.2 Other Federal Legislation.....	15
1.2.3.2.1 Status of the Artist Act	16
1.2.3.3 Provincial Legislation.....	17
1.2.3.4 Other Legislation	17
1.2.4 International Law	17
1.2.4.1 National Treatment.....	18
1.2.4.2 Basic Treaties	18
1.2.4.2.1 Berne Convention	19
1.2.4.2.2 Universal Copyright Convention	19
1.2.4.2.3 TRIPS Agreement	20
1.2.4.3 Subject Matter Specific Treaties	20
1.2.4.3.1 Rome Convention	20
1.2.4.3.2 Geneva Convention.....	21
1.2.4.3.3 Vienna Agreement.....	21
1.2.4.3.4 Copyright Treaty.....	21
1.2.4.3.5 Performance and Phonogram Treaty ...	21
1.2.4.3.6 Marakesh Treaty.....	22
1.2.4.3.7 Beijing Treaty	22
1.2.4.3.8 Broadcast Treaty.....	22
1.2.4.4 Regional Treaties	22
1.2.5 Ministerial Notice	23
1.2.6 Interpretation of Act	25
1.2.6.1 Balance	25
1.2.6.2 Approach.....	26
1.2.6.3 Relevance of Treaties	27

1.2.6.4	Linguistic Inconsistency.....	27
1.2.6.5	Influence of Foreign Law.....	28
1.2.6.6	Technological Neutrality.....	28
1.2.7	Legislative Amendment.....	31
1.2.7.1	Recent Amendments.....	32
1.2.7.2	Recent Proposals and Bills.....	32
1.3	WHAT WORKS AND OTHER SUBJECT MATTER ARE	
	PROTECTED BY COPYRIGHT.....	35
1.3.1	What is Not Protectable.....	35
1.3.2	Protectable Works.....	37
1.3.3	Literary Works.....	38
1.3.3.1	Literary Entertainment Works.....	41
1.3.3.2	Derivative Literary Works.....	42
1.3.3.3	Translations of Literary Works.....	42
1.3.4	Computer Programs.....	43
1.3.4.1	Instructions or Statements.....	45
1.3.4.2	Specific Result.....	45
1.3.4.3	Idea v. Expression.....	46
1.3.5	Artistic Works.....	49
1.3.5.1	Architectural Works.....	54
1.3.5.2	Works of Artistic Craftsmanship.....	55
1.3.5.3	Audio-visual Works.....	55
1.3.5.4	Portraits and Engravings.....	56
1.3.5.5	Photographs.....	56
1.3.5.6	Derivative Artistic Works.....	57
1.3.6	Musical Works.....	58
1.3.6.1	Songs.....	59
1.3.6.2	Derivative Musical Works.....	59
1.3.7	Dramatic Works.....	59
1.3.7.1	Choreographic Works.....	61
1.3.7.2	Electronic Media Works.....	61
1.3.7.3	Derivative Dramatic Works.....	62
1.3.7.4	Cinematographic Works.....	62
1.3.8	Compilations.....	63
1.3.8.1	Databases.....	65
1.3.9	Collective Works.....	66
1.3.10	Derivative Works.....	67
1.3.11	Other Protectable Subject Matter.....	67
1.3.11.1	Performers' Performances.....	68
1.3.11.2	Sound Recordings.....	68
1.3.11.3	Communication Signals.....	70
1.3.12	Presumption as to Subsistence of Copyright.....	70

1.4 WHAT THE CONDITIONS FOR COPYRIGHT ARE	70
1.4.1 Works	71
1.4.1.1 Originality	71
1.4.1.2 Computer Generated Works	75
1.4.1.3 Fixation	75
1.4.1.4 Qualified Author	77
1.4.1.5 Publication	78
1.4.1.5.1 Electronic Publication	80
1.4.1.5.2 Unpublished Works	81
1.4.1.5.3 Published Works	81
1.4.1.6 Cinematographic Works	82
1.4.2 Other Subject Matter	82
1.4.2.1 Performers' Performances	82
1.4.2.2 Sound Recordings	85
1.4.2.3 Communication Signals	87
1.5 WHO THE AUTHOR OR OTHER CREATOR IS	87
1.5.1 Author	88
1.5.1.1 Editor	89
1.5.2 Compilations and Collective Works	90
1.5.3 Works of Joint Authorship	90
1.5.4 Works Created by Computer	93
1.5.5 Works Created by Animal	94
1.5.6 Rules for Certain Types of Works	94
1.5.6.1 Photographs	94
1.5.6.2 Cinematographic Works	95
1.5.7 Other Subject Matter	96
1.5.7.1 Performers' Performance	96
1.5.7.2 Sound Recording	97
1.5.7.3 Communication Signal	97
1.5.8 Presumptions as to Authorship and Creatorship	97
1.6 WHO THE OWNER IS	98
1.6.1 Basic Rule	98
1.6.2 Works	99
1.6.2.1 Works of Joint Authorship and Co-Ownership	99
1.6.2.2 Employees	100
1.6.2.3 Independent Contractors	104
1.6.2.4 Commissioned Works	104
1.6.2.5 Governments	105
1.6.2.5.1 Crown Prerogative	109
1.6.2.6 Photographs	110
1.6.2.7 Commissioned Photographs	111
1.6.2.8 Commissioned Engravings	113
1.6.2.9 Commissioned Portraits	114

1.6.2.10	Cinematographic Works.....	114
1.6.2.11	Computer-generated Works.....	115
1.6.2.12	Compilations.....	115
1.6.3	Other Subject Matter	115
1.6.3.1	Performers' Performances.....	115
1.6.3.2	Sound Recordings	115
1.6.3.3	Communications Signals	115
1.6.4	Assignment	116
1.6.4.1	Writing	118
1.6.4.2	Equitable Ownership	120
1.6.4.3	Formalities.....	121
1.6.4.4	Multiple Assignments.....	122
1.6.5	Right of Reversion	122
1.6.6	Bankruptcy	123
1.6.7	Presumptions as to Ownership	125
1.7	HOW COPYRIGHT IS REGISTERED	126
1.7.1	Application	127
1.7.2	Effect of Registration	128
1.7.3	Notice	129
1.8	WHAT AUTHOR'S RIGHTS ARE	130
1.8.1	Moral Rights	130
1.8.1.1	Works	130
1.8.1.1.1	United States	133
1.8.1.2	Performers' Performances.....	134
1.8.2	Right of Restraint	136
1.8.3	Right to Remuneration	137
1.9	WHEN COPYRIGHT SUBSISTS.....	141
1.9.1	Anonymous and Pseudonymous Works.....	143
1.9.1.1	Anonymous and Pseudonymous Works of Joint Authorship.....	143
1.9.2	Posthumous Works	144
1.9.3	Works of Joint Authorship	146
1.9.4	Government Works.....	146
1.9.5	Cinematographic Works.....	147
1.9.6	Photographs.....	147
1.9.7	Performers' Performances.....	149
1.9.8	Sound Recordings	151
1.9.9	Communication Signals.....	152
1.9.10	Abandonment	153
1.10	HOW COPYRIGHT INTERFACES WITH OTHER INTELLECTUAL PROPERTY RIGHTS.....	153
1.10.1	Patents	153
1.10.2	Trademarks.....	154

1.10.3	Integrated Circuit Topographies	155
1.10.4	Industrial Designs	156
1.10.4.1	Interface with Copyright	157
1.10.4.2	Useful Articles	158
1.10.4.3	Exclusion from Infringement of Copyright	159
1.10.4.4	Exceptions to Exclusion for Certain Artistic Works	161
1.10.4.4.1	Graphic or Photographic Representation	162
1.10.4.4.2	Trademark	163
1.10.4.4.3	Woven or Knitted Pattern or for Piece Products, Surface Coverings or Apparel	164
1.10.4.4.4	Architectural Work	164
1.10.4.4.5	Representation of Real or Fictitious Being, Event or Place	165
1.10.4.4.6	Set	165
1.10.4.4.7	Prescribed by Regulation	165
1.10.4.5	Utilitarian Features of Useful Articles	166
1.10.4.6	United States	167
1.10.4.7	United Kingdom	170
Chapter 2	Copyright—What Is It?	173
2.1	INTRODUCTION	175
2.2	THE STATUTORY BASIS OF COPYRIGHT LAW	180
2.3	RIGHTS UNDER THE <i>COPYRIGHT ACT</i>	180
2.4	PURPOSE OF COPYRIGHT	182
2.5	COPYRIGHT IN WORKS	184
2.5.1	Reproduction Right	187
2.5.2	Public Performance	193
2.5.3	Publication	193
2.5.4	Converting a Work	196
2.5.5	Communication to the Public by Telecommunication	197
2.5.6	Public Exhibition of an Artistic Work	203
2.5.7	Rental of Computer Programs and Sound Recordings of Musical Works	203
2.5.8	Distribution	204
2.5.9	Authorization	204
2.6	COPYRIGHT IN PERFORMERS' PERFORMANCES	206
2.7	COPYRIGHT IN SOUND RECORDINGS	208
2.8	COPYRIGHT IN COMMUNICATION SIGNALS	209
2.9	MORAL RIGHTS	210
2.9.1	Right of Integrity	211
2.9.2	Right of Attribution	213

2.10	RIGHTS TO RECEIVE REMUNERATION.....	214
2.10.1	Equitable Remuneration for a Sound Recording	214
2.10.2	Royalties for the Retransmission of Distant Signals	216
2.10.3	Remuneration for the Reproduction for Private Use of Musical Works, Sound Recordings and Performers’ Performances.....	216
2.11	CROWN COPYRIGHT	219
2.12	CONCLUSION	220
	Chapter 3—Fair Dealing	221
3.1	INTRODUCTORY OVERVIEW	223
3.2	THE STATUTORY CONTEXT	224
3.3	THE JUDICIAL CONTEXT: <i>CCH CANADIAN LTD. v. LAW SOCIETY OF UPPER CANADA</i>	226
3.4	THE FAIR DEALING ANALYSIS.....	228
3.4.1	The “Purpose” of the “Dealing”	229
3.4.1.1	Research	230
3.4.1.2	“Private Study”	233
3.4.1.3	“Criticism,” “Review” and “News Reporting”	234
3.4.1.4	“Education”	237
3.4.1.5	“Parody or Satire”	238
3.4.1.6	“Dealing”	241
3.4.2	The “Fairness” of the Dealing.....	242
3.4.2.1	The Purpose of the Dealing.....	244
3.4.2.2	The Character of the Dealing	247
3.4.2.3	The Amount of the Dealing	249
3.4.2.4	Alternatives to the Dealing.....	252
3.4.2.5	The Nature of the Work	254
3.4.2.6	Effect of the Dealing on the Work	255
3.4.2.7	Application of the Fair Dealing Framework.....	259
3.4.3	Fair Dealing-Related Exceptions	260
3.4.3.1	Section 29.21: Non-Commercial User-Generated Content (UGC)	260
3.4.3.2	Section 29.22: Reproduction for Private Purposes	263
3.4.3.3	Section 29.23: Reproduction for Later Listening or Viewing	263
3.4.3.4	Section 29.24: Backup Copies.....	264
3.5	APPLICABILITY OF FOREIGN DECISIONS.....	264
	Chapter 4—Infringement and Civil Remedies	267
4.1	INTRODUCTION	271
4.2	ACTS OF INFRINGEMENT	272
4.2.1	Primary Infringement	272

4.2.1.1	Reproduce.....	273
4.2.1.2	Exact Copy	274
4.2.1.3	Copying a “Substantial Part”	274
4.2.1.4	Computer Stored Information	279
4.2.2	Definition of “Infringing”	280
4.2.2.1	“Colourable Imitation”	280
4.2.2.2	Telecommunication “to the Public”	281
4.2.3	Secondary Infringement.....	282
4.2.3.1	Possession for the Purpose of Sale or Distribution	283
4.2.4	Proving Access to the Original—A Causal Connection	283
4.2.5	Where Infringement Occurs Geographically.....	284
4.3	DEFENCES TO INFRINGEMENT	286
4.3.1	Work Not Subject to Copyright Protection	286
4.3.2	Plaintiff Is Not the Owner of Copyright	287
4.3.3	Copying is “Insubstantial”	288
4.3.4	Independent Creation.....	288
4.3.5	Ignorance of Existence of Copyright	289
4.3.6	Statutory Exemptions—Users’ Rights.....	289
4.3.6.1	Fair Dealing for Research, Private Study, Education, Parody, Satire, Criticism, Review, or News Reporting.....	289
4.3.6.2	Acts Undertaken Without Motive of Gain	292
4.3.6.3	Non-commercial User Generated Works	292
4.3.6.4	Reproduction for Private Purposes.....	292
4.3.6.5	Time Shifting: Reproduction for Later Listening or Viewing	293
4.3.6.6	Backup Copies	293
4.3.7	Exceptions for Educational Institutions	294
4.3.7.1	Right to Display	294
4.3.7.2	Right to Reproduce, Translate, Perform or Telecommunicate Publicly for Tests and Examinations	295
4.3.7.3	Performance Uses.....	295
4.3.7.4	News and Commentary	296
4.3.7.5	Reproduction for Broadcast	296
4.3.7.6	Literary Collections.....	297
4.3.7.7	Lessons	297
4.3.7.8	Digital Reproductions of Works.....	298
4.3.7.9	Works Available Through Internet.....	300
4.3.8	Exceptions for Libraries, Archives and Museums	300

4.3.8.1	Copy Machines Installed in Educational Institutions, Libraries, Archives and Museums	303
4.3.8.2	Libraries, Archives and Museums in Educational Institutions	304
4.3.8.3	Library and Archives of Canada	304
4.3.9	Computer Programs	304
4.3.9.1	Permitted Acts	304
4.3.9.2	Interoperability of Computer Programs	304
4.3.9.3	Encryption Research	305
4.3.9.4	Security	305
4.3.10	Incidental Inclusion	306
4.3.11	Temporary Reproductions	306
4.3.12	Ephemeral Recordings	306
4.3.13	Retransmission	308
4.3.14	Network Services	309
4.3.15	Perceptual Disabilities	310
4.3.14	Exceptions from Infringement in Other Statutes	312
4.4	MISCELLANEOUS EXEMPTIONS TO COPYRIGHT INFRINGEMENT	313
4.5	REMDIES	314
4.5.1	Standing of the Plaintiff	314
4.5.2	Injunctions	315
4.5.2.1	Interim and Interlocutory Injunctions	317
4.5.2.2	Anton Piller Orders to Preserve Evidence	319
4.5.2.3	Permanent Injunctions	320
4.5.2.4	“Wide” Injunction for Other Works or Subject Matter	321
4.5.2.5	Delivery Up of Infringing Copies and Plates	321
4.5.3	Damages	322
4.5.3.1	No Reasonable Ground to Believe Copyright Subsisted	325
4.5.3.2	Exemplary or Punitive Damages	325
4.5.3.3	Statutory Damages	332
4.5.3.4	High Range	340
4.5.3.5	Mid-Range	343
4.5.3.6	Low Range	344
4.5.4	Profits	349
4.5.5	Possession of Infringing Copies and Plates Used to Make Them (Conversion)	351
4.6	MISCELLANEOUS	352
4.6.1	Standard of Review from Decisions of The Copyright Board	352
4.6.2	The Notice and Notice Regime	353

4.6.2.1	Notices of Claimed Infringement.....	354
4.6.2.2	ISPs' Obligations in Response to Claimed Infringement Notices	355
4.6.2.3	ISPs' Obligations in Response to a Norwich Order	356
4.6.2.4	Failure to Comply with the Notice and Notice Regime.....	356
Chapter 5—Canadian Law of Industrial Design		357
5.1	OVERVIEW	360
5.2	HISTORY	362
5.3	INDUSTRIAL DESIGN DEFINED.....	365
5.4	REGISTRABILITY — Utilitarian Function	370
5.5	NOVELTY	371
5.5.1	Originality.....	372
5.5.2	Authorship.....	377
5.6	THE REGISTRATION PROCESS	378
5.6.1	The Application	378
5.6.1.1	Title	378
5.6.1.2	Description and Statement of Limitation.....	379
5.6.1.3	Representations.....	380
5.6.2	The Proprietor	380
5.6.3	Time for Filing an Application.....	381
5.6.3.1	Publication.....	382
5.6.3.2	Delay of Registration	383
5.6.4	Priority	383
5.6.5	Examination.....	384
5.6.5.1	Advanced Examination	385
5.6.6	Reinstatement of Application	385
5.6.7	Variants	385
5.6.7.1	Divisional Applications	386
5.6.8	Term.....	386
5.6.9	Territory	387
5.6.10	Disputes over Registrability.....	387
5.7	THE EXCLUSIVE RIGHT	389
5.8	INFRINGEMENT	390
5.8.1	Infringement of the Exclusive Right	390
5.8.2	The Action for Infringement	390
5.8.3	Assessing Infringement.....	391
5.8.4	Presumption of Validity	393
5.8.5	Defences.....	394
5.8.5.1	Marking - No Reason to Suspect Design was Registered	394
5.8.7	No Provision for Reasonable Compensation	394

5.9	REMEDIES.....	395
5.9.1	Interlocutory Relief.....	395
5.9.2	Damages.....	395
5.9.3	Accounting for Profits.....	396
5.9.4	Permanent Injunction.....	396
5.9.5	Declarations of Non-Infringement.....	396
5.10	ASSIGNMENT AND LICENSING.....	396
5.10.1	Assignment.....	397
5.10.2	Licences.....	397
5.11	OVERLAP WITH OTHER INTELLECTECTUAL PROPERTY RIGHTS.....	397
5.11.1	Patents.....	397
5.11.2	Trademarks.....	397
5.11.2.1	Industrial Design and Distinguishing Guise.....	398
5.11.2.2	Industrial Design and Passing Off.....	398
5.11.3	Copyright.....	399
5.12	OTHER MISCELLANEOUS ISSUES.....	401
5.12.1	Situs of Industrial Design.....	401
5.13	BIBLIOGRAPHY.....	401
	Index.....	403