

# **Copyright for Artists in the Digital Age**

*A supplement to the previous Copyright guide:  
Demystifying Copyright*

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## Introduction

This guide is a supplement to *Demystifying Copyright*, a previous Fredericton Arts Alliance guide to artist copyright concerns. *Demystifying Copyright* provides a general introduction to Canadian copyright law for artists. This guide reflects changes in Canadian Copyright law and artist concerns in recent years, with a particular emphasis on social media. The first part of the guide talks about recent changes to the law. The second part focuses on social media and the legal concerns artists may have when using social media websites to promote their works.

In the summer of 2012, copyright law in Canada underwent a significant change. This change reflects the changing world of the arts and the new technologies being implemented. *The Copyright Modernization Act (CMA)* and a series of Supreme Court of Canada cases have clarified copyright in the modern age.

## Some Terms to Get Acquainted With

### Copyright

Copyright refers to someone's legal right to use or reproduce a work, or any part of that work. It applies to all art forms including music, painting, writing, and performance art.

The Canadian [Copyright Act, s.3\(1\)](#) defines it this way:

Copyright is “*the sole right to produce or reproduce the work or any substantial ... part thereof in any material form whatever... and to authorize any such acts*”

### Infringement

Infringement, under the [Copyright Act, s. 27\(1\)](#), is unauthorized use of works under copyright. Unauthorized uses include selling, renting or distributing the work without consent of the creator. Violators can be held accountable by the court enforcing remedies such as turning over of profits, ordering a stop to the infringing action, damages, and any other penalty provided by the Act at the discretion of the courts.

### Fair Dealing

One exemption to infringement is “fair dealing”. The fair dealing clauses of the [Copyright Act](#) exempt users from copyright infringement when the use is related to research, private study, criticism, review, or news reporting.

## **Terms of Service**

The “terms of service” section of any website will outline its policies and procedures regarding the sharing of content. It is a good idea to read through all the terms of service of a website so that you know what you are agreeing to *before* uploading or sharing content. The terms of service listed on the websites are a legally binding agreement (see below).

## ***DMCA***

[\*Digital Millennium Copyright Act\*](#) is American legislation that protects copyright for websites hosted in the United States. It is applicable to all websites hosted in the U.S., so even if you access an American site from Canada, this American law still applies.

## ***CMA***

The [\*Copyright Modernization Act\*](#) was a 2012 amendment made to the Canadian *Copyright Act* in order to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards.” Today the amendments made by the *CMA* are included in the *Copyright Act*.

## **Content**

For the purposes of this document we have defined content as the work of art in question. For example: Photos, videos and recordings, etc. are content.

## **Royalties/Tariffs**

Money collected for the use of content. For example: When a song is downloaded on iTunes, the artist collects a royalty/tariff from iTunes.

## **Jurisdiction**

Refers to a specific geographic area over which legal authority extends. The jurisdiction is most important in the context of copyright when looking at where various websites are based. Their physical location will decide the geographic area in which any legal action will take place (ex. Canada vs. the United States, New Brunswick vs. Florida).

## Non-Commercial User-Generated Content

[Non-commercial user-generated content](#) is another exception to copyright. When an individual makes use of content available to the public in the creation of new content that is:

- 1) For a non-commercial purpose,
- 2) While giving the source,
- 3) Where the source is not already infringing copyright, and
- 3) That does not have an adverse effect on the copyright holder.

For example: Taking a video you made of your cat and adding music that you have purchased (and listing the author) to share with family and friends is non-commercial user-generated content.

## Moral Rights

Moral rights are about the integrity of a work. It is a right separate from copyright that allows an artist to limit how their work is used or displayed so that they may protect their reputation. For example if the city of Fredericton commissions you to create a marble statue, and then after it's completed they decide to paint it blue, that is a moral rights issue. The painting of the statue does not infringe your copyright but it does significantly change your work and you may invoke your moral rights to protect the integrity of your reputation and creation. Artists can also choose to waive their moral rights; doing so does not affect their copyright.

## Writer Concerns

### ***Recent Developments***

As fair dealing is defined under the *CMA*, copies made of written materials like those in textbooks do not count as copyright infringement if they are done in a classroom setting for the purposes of education. For example if you only require one chapter from a textbook for a class of 40 you may be permitted to buy one book and make copies of the chapter instead of buying 40 whole books. The [Copyright Board of Canada](#) provides periodic guidance on educational and other tariffs.

### ***Infringements on Your Content***

User-generated content is a new provision that permits you to use copyrighted works to create a new work for non-commercial purposes. However you must include credit to the copyright owner where reasonable. Furthermore, you can only use content that is not an infringing copy itself (i.e. legally obtained).

There is no copyright infringement when making a copy of a work that in and of itself isn't infringing any copyright. This includes recording content for later, transferring it from one format to another and making back-up copies.

## **Performer Concerns**

### ***Recent Developments***

Before the *CMA*, performers were excluded from having "moral rights." Now, thanks to the new provisions, the *CMA* gives performers moral rights in their performances.

If your work is included in a TV show or movie and that movie is played in public it does not count as a communication that would qualify for a tariff or royalty.

### ***Infringements on Your Content***

Fair dealing has been expanded to include the following exceptions: parody, satire and education in addition to the previous exceptions for private study, news reporting, criticism and review. There is the possibility that your work could be infringed but the infringement falls under one of the categories above making the action fair dealing. For example a copy made of your dance performance used in a news report on dance in the Fredericton area that appears to be an infringement of your copyright could qualify as fair dealing.

User-generated content is a new provision that permits you to use copyrighted works to create a new work for non-commercial purposes. However you must include credit to the copyright owner where reasonable. Furthermore, you can only use content that is not an infringing copy (i.e. legally obtained).

There is no copyright infringement when making a copy of a work that in and of itself isn't infringing any copyright. This includes recording content for later, transferring it from one format to another and making back-up copies.

## **Musician Concerns**

### ***Recent Developments***

The Supreme Court of Canada has clarified a number of areas where royalty collecting societies, and in turn creators, will not be able to collect tariffs/royalties.

Previews of songs online do not require a license and do not count towards the calculation of royalty fees. Previews are considered to fall under the research branch of fair dealing.

Example: When a videogame that contains one of your songs is downloaded it does not count as a communication that would qualify for a tariff. When you sell a song to a movie or TV show

you are effectively transferring your copyright to the producers. This means that you are not able to collect royalties per download.

If your work is included in a TV show or movie and that movie is played in public it does not count as a communication that would qualify for a tariff.

But don't despair! The Supreme Court has recognized an area where you can collect a tariff. When a user requests a stream, the resulting stream counts as a communication which qualifies for a tariff.

### ***Infringements on Your Content***

Fair dealing has been expanded to include the following exceptions: parody, satire and education in addition to the previous exceptions for private study, news reporting, criticism and review. There is the possibility that your work could be infringed but the infringement falls under one of the categories above, making the action fair dealing. For example, an online article critiquing your musical work could contain a clip that, although an infringing copy, may qualify as fair dealing.

Removing or altering rights management technology or circumventing a technological protection measure is now considered an infringement. For example certain online mp3 retailers place code on their mp3s that only allow them to be played on one device. If you were to erase the code to use the copy on different devices this would constitute a circumvention of a technological protection measure.

User-generated content is a new provision that permits you to use copyrighted works to create a new work for non-commercial purposes. However you must include credit to the copyright owner where reasonable. Furthermore, you can only use content that is not an infringing copy (i.e. legally obtained).

There is no copyright infringement when making a copy of a work that in and of itself isn't infringing any copyright. This includes recording content for later, transferring it from one format to another and making back-up copies.

## **Visual Artist Concerns**

### ***Infringements on Your Content***

Now, under the *CMA* photographs are treated the same way as all other works in regards to copyright. Photographers are the first owner of copyright of their works. The copyright is protected for the life of the photographer, plus 50 years after his/her death. Infringements of photographic content are now the same as infringements on any other work.

One exception is non-commercial or personal reproduction of a commissioned photographic work which is now explicitly permitted unless specified otherwise in a contract For example, if



there is nothing in the contract specifying otherwise, a High School student can reproduce copies of their graduation pictures commissioned from a photographer and give the copies to relatives.

Under the [CMA](#), fair dealing has been expanded to include the following exceptions: parody, satire and education. This expands on the previous exceptions for private study, news reporting, criticism and review. There is the possibility that your work could be infringed but the infringement falls under one of the categories above, making the action fair dealing. For example, if you copied a photo taken by another of the Mona Lisa, this would be an infringement. However, if you copied the photo and included it in a criticism of the use of female subjects in portraits it may qualify as fair dealing.

User-generated content is now covered under a new provision better known as the “YouTube Provision” that permits you to use copyrighted works to create a new work for non-commercial purposes. If, for example, you were to make a home movie of your cat, and decide to score it with a Pink Floyd song, you have technically created new content that is “not-for-profit”. Under the *CMA* rules, this is completely allowed as long as you make an effort to credit the copyright owner. However you must include credit to the copyright owner where reasonable. Furthermore, you can only use content that is not itself an infringing copy (i.e. legally obtained).

There are no rules against reproducing something that is copyrighted if it is only for personal use. For example, copying a music CD to your computer. The *CMA* also explicitly includes recording content for later, transferring it from one format to another and making back-up copies.

## **The *DMCA* and Social Media**

The *Digital Millennium Copyright Act* or (*DMCA*) is an important law regarding copyright and the internet in the United States. For Canadians, it is most important because it applies to most of the American social media sites we use. For the purposes of copyright and social media, the most significant aspect of the *DMCA* is ‘safe harbour’ status.

### ***What is ‘Safe Harbour Status’***

Safe harbour status protects websites from getting sued due to the copyright infringements of their users. Safe harbour status is incredibly valuable to social media websites because it protects them from expensive lawsuits. However this protection is only granted to websites that comply with *DMCA* rules.

These rules include:

- Not displaying any content on a website that they know to be infringing on another’s copyright
- Responding quickly to complaints of copyright infringement by removing or disabling access to the content
- Having a system that allows copyright holders to file complaints of copyright infringements that occur on a website
- Making the terms of use of a website available to users
- Not profiting from the display of infringing content

Safe harbour status provides websites with a strong incentive to respect copyright online. If a website fails to follow the rules of the *DMCA* by, for example, not responding to a copyright complaint, it risks losing its safe harbour status and may face costly lawsuits.

There are a few further points about the *DMCA* that artists should be aware of:

1. The responsibility is on the website owner to delete content that violates copyright laws, but they are only responsible for violations that are brought to their attention. The person who has the copyright is expected to protect it and file a complaint when necessary. This means that as an artist you must police your own copyright.

a. 'Safe harbour' websites are not responsible for finding and removing your copyrighted work and you must be vigilant. Practically speaking, this means that you need to be able to keep track of the things you post, which can be difficult as other people re-post them. There are companies that will monitor copyrighted content for a fee, but this isn't a practical solution for everyone. A better solution could be to post images/videos at reduced quality or with a watermark to make it more difficult for non-authorized people to re-use them.

2. Delete First, Ask Questions Later

a. The *DMCA* does not require websites to investigate whether complaints of copyright infringement they receive are valid. Websites will not do an investigation; they will simply remove the content.

b. If your art is removed because of a false copyright complaint you can respond with a 'counter notice' claiming that the content does not infringe any copyright. If the complaining party does not file a lawsuit within 14 days, the website will reinstate the content.

c. Keep in mind that filing a complaint and responding to a complaint can set legal proceedings in motion and there is the real possibility of incurring legal costs. Most websites recommend consulting with a lawyer before acting.

So the *DMCA* is really effective at getting websites to respond to complaints of copyright infringement and thus protecting copyright on the internet. However it is of little use to artists unless they know how their art is being used by other people online, because it puts the responsibility on copyright holders to issue complaints before anything is done. Another potential concern for artists is that complaints usually result in content being automatically deleted. This may result in legitimate original art being removed on a suspicion of copyright violation.

## ***Using Other People's Stuff***

“Reposting”, “sharing” and “linking to” content posted by others is common practice in today’s social media era. While the new guidelines on “fair dealing” have expanded legally, using content to which others have the copyright (especially to make money!) can be tricky.

Most social media sites have policies under which they reserve the right to take down any content they deem inappropriate or an infringement of intellectual property.

Some examples of action taken by websites can include:

If you receive a **notification** that a [post] has been **removed** due to a copyright complaint, it means that the [post’s] **content has been deleted** from [this site] at the request of the content’s owner. If your account receives too many copyright complaints, you may **lose the ability to [post] new content** on [this site], and your account may be **disabled** completely.<sup>1</sup>

After **removing material** pursuant to a valid **DMCA notice**, [this site] will immediately notify the Subscriber responsible for the allegedly **infringing** material that it has **removed or disabled access** to the material. [This site] reserves the right, in its sole discretion, to immediately **terminate the account** of any Subscriber who is the subject of repeated **DMCA** notifications<sup>2</sup>

“If someone else might own the copyright to it, **don’t upload it**” [without permission or credit given] [...]

“**Don’t hotlink** to such content, or to **file-sharing** or **torrent** sites.” [...]

[If] you do anything **illegal** [...] we will **ban** you along with the site you're hotlinking from, **delete** all your images, **report** you to the **authorities** [...] and **prevent** you from viewing any images hosted on [this site]. We mean it.<sup>3</sup>

Protecting your own content once it has been sent out into cyberspace can be very difficult. For the majority of artists, it means knowing where your content is online and being engaged in policing it. Recently, some people have taken to posting disclaimers on websites like Facebook (see below), but it is important to note that these declarations are in no way legally enforceable, and are effectively useless.

Facebook disclaimers posted by users are ultimately useless. Many versions of them have been circulated, and many use pseudo-legal language in order to feign credibility. No such disclaimer is able to change or override copyright law. Beware of these false protections. Posting notices

<sup>1</sup> <http://pinterest.com> (accessed March 2013) Updated 2018: <https://policy.pinterest.com/en/copyright>

<sup>2</sup> <https://www.tumblr.com> (accessed March 2013) Updated 2018: <https://www.tumblr.com/policy/en/terms-of-service#dmca>

<sup>3</sup> <http://imgur.com> (accessed March 2013) Updated 2018: <https://imgur.com/tos>

such as “I hereby declare that my copyright is attached to all of my personal details, illustrations, comics, paintings, professional photos and videos, etc. (as a result of the Berne Convention)...” will do nothing to limit other people’s use of your content.

## Protecting your own Content

When you post your copyrighted content on a social media website you still own the copyright. But by posting content you grant the website a licence to use your content in certain ways. The terms of the licence vary from website to website. But there are some general similarities. For example the clause below is from Facebook’s terms of service (2013). Some variation of it is found in most social media websites.

“... you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook”

(<https://www.facebook.com/legal/terms> legal terms section 2.1)

This is intimidating language, but if you separate out and define the terms it become clearer:

- **Licence**: A licence means permission to use something in certain ways. The following terms defines the kind of licence Facebook users grant to the website.
- **Non-exclusive**: The licence you are granting to the website does not limit your ability to simultaneously licence your content to anyone else.
- **Transferable**: This means they can transfer the licence on to someone else without your permission.
- **Sub-licensable**: The licence may extend to the affiliates, subcontractors and partners of the website.
- **Royalty-free**: This effectively means you can’t make money by posting content on the website. They are under no obligation to pay you for the use of your content.
- **Worldwide**: Worldwide simply means the licence applies everywhere in the world; it is not limited to any particular country.

A licence that includes these terms is pretty extensive. It means that whatever you post online, the website can use without paying for it, and other people can access without paying for it. But the licence applies only to the specific website. It’s important to note that laws and debates regarding social media and the law are ongoing, and are likely to change often and without notice.

All of the above information is taken from the terms of service agreements from various social media sites as they existed in March, 2013. Be aware that the terms of service for a website can change at any time without notice so you may want to check to see if the terms have changed.

### ***What about if someone violates your copyright online?***

If you see your content online without your permission you need to file a complaint called a *DMCA* report to the website, (if it is an American website). Some websites provide a form, others just give a list of information that you need to provide. The important thing to be aware of is that when you file a complaint you set in motion a potentially serious legal process. The website will respond to a complaint typically by automatically removing the content. If the complaint turns out to be false the person who had their content wrongly removed may take legal action and the person who made the false report may be on the hook for all the legal costs incurred. Most service providers recommend consulting with a lawyer to be sure that there is actual copyright violation before filing a complaint.

## **Appendix of Additional Information Sources**

*Terms of Use for Social Media Websites:*

<http://www.facebook.com/legal/terms> Section 2

<http://www.youtube.com/static?gl=US&template=terms> Sections 5 and 8

<https://twitter.com/tos>

<http://ca.myspace.com/Help/Terms> Section 6

<http://www.dailymotion.com/legal> Sections 2, 3 and 6

*Other helpful sites:*

Here is a summary of the *DMCA*, the Title II section is most relevant to social media use.

<http://www.copyright.gov/legislation/dmca.pdf>

Chilling effects clearinghouse is an organization created by American law schools that work to protect lawful online activity from legal threats. They have a summary and FAQ's on the *DMCA*.

<http://chillingeffects.org/>

This is an article by a lawyer about copyright and social media.

<http://www.nyccounsel.com/business-blogs-websites/who-owns-photos-and-videos-posted-on-facebook-or-twitter/>

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