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CANADIAN COPYRIGHT LAW

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DERIVATIVE WORKS IN CANADIAN COPYRIGHT LAW

Jacques writes a novel in French. James translates it into English. Jim writes a play based on James's translation. Jimmy makes the play into a movie. Mel records the movie on a videocassette without the permission of Jacques, James, Jim or Jimmy. Advise Mel concerning his potential copyright liability.

No one, other than a student taking an examination in a course on the law of copyright, is likely to receive a perverse request for advice of this kind. Still the problem serves to illustrate several ways in which someone can take an existing intellectual product and by contributing further creative effort, develop a new and different intellectual product, one known in copyright law as a "derivative work." But while the phenomenon of the derivative work has not been ignored by Canadian copyright law, the issues that such works raise, like those posed in the hypothetical problem, have gone without systematic analysis and resolution.

The United States Copyright Act of 1976\(^1\) defines "derivative work" in part as a work "based upon one or more pre-existing works, such as translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted".\(^2\) But the term "derivative work" does not appear anywhere in the Canadian Copyright Act,\(^3\) and Dr. Fox, in The Canadian Law of Copyright,\(^4\) makes no reference to the term. The Canadian law on derivative works has evolved on a case by case basis and no cohesive or comprehensive doctrine has emerged in the process. The various types of derivative works have not been considered as a single group despite the fact that the underlying conceptual issues and policy questions are the same for
most of them.

This article surveys the range of traditional derivative works, examines critically the present Canadian law of copyright on a number of various issues, and makes specific proposals for legislative reform. The focus throughout is on the relationship, or, perhaps more accurately, the tension which exists in law between the underlying work and the derivative work. The paper begins by considering whether the derivative work may itself be protected by copyright. Then there is an examination of the extent to which the rights of the owner of the copyright in the underlying work are interfered with by the production and exploitation of the derivative work. It will be demonstrated in this portion of the paper that the production of a derivative work may infringe the copyright in the underlying work. This raises in turn the next problem to be explored; if a derivative work is made by infringing the copyright in the underlying work, does this affect the copyright status of the derivative work? Next, there is a discussion of some of the practical problems associated with the enforcement of the rights in a derivative work. And finally, to complete this brief study of derivative works three specific questions, each raising difficulties associated with derivative works, have been chosen for analysis: what happens when consent to produce a derivative work, once given, is withdrawn; can a copy of a derivative work ever be an "infringing" copy of the underlying work; and can commercial dealings in copies of a derivative work "publish" the underlying work?
Copyright in the Derivative Work

A derivative work can be produced in essentially one of three situations: first, where the underlying work is in the public domain, that is, the underlying work is, or no longer is, the subject of copyright; second, where there is copyright in the underlying work and the creator of the underlying work, or at least the owner of the copyright in the underlying work, produces the derivative work; and third, where the derivative work is produced, with or without the permission of the owner of the copyright in the underlying work, by someone else. Many problems exist only in relation to one of these particular categories of derivative work. This analysis will begin with a discussion of the law relating to derivative works generally, with a return to specific situations later in the paper.

As noted above, the term "derivative work" does not appear in the Canadian Act. But more importantly, derivative works as such are not addressed at all in the present statute. The Berne Convention, to which Canada is a signatory and the text of which appears as the Third Schedule annexed to the Canadian Act, provides in Article 2(2) that:

Translations, adaptations, arrangements of music and other reproductions in an altered form of a literary or artistic work, as well as collections of different works, shall be protected as original works without prejudice to the rights of the author of the original work.
The Convention does not, however, form part of Canadian copyright law and no provision conforming to Article 2 has been included in the copyright statute. Accordingly, in Canada derivative works must be considered in light of the statutory provisions dealing with ordinary works. Copyright, as defined in s.3 of the Canadian Act subsists in "every original literary, dramatic, musical and artistic work" as those terms are defined in the statute and subject to the limitations set out therein. If copyright subsists in a derivative work, it is because it qualifies as an original literary, dramatic, musical or artistic work.

As a general proposition then, the existence of copyright in a derivative work turns on whether or not the work is "original". In other words, "Can there be copyright in a copy?" Whitford J. in L.B. (Plastics)Ltd. v. Swish Productions answered the question in the affirmative and the House of Lords, on appeal, endorsed that view. According to Lord Wilberforce the word original as used in the United Kingdom Copyright Act, 1956 comports "not 'originality' but that the work is the product of the author's work and labour". Or, as explained by Peterson, J. in slightly less elliptical terms over seventy-five years ago:

"the word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and in the case of 'literary work', with the expression of
thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author." 12

This passage accurately describes the test of "originality" for Canadian copyright law. 13

It is clear then that a derivative work which is based upon one or more pre-existing works, may still be an "original" literary, dramatic, musical or artistic work in its own right. But not every derivative work will qualify as an original work. "A mere copyist has no right to obtain a copyright in his work." 14 It will, in each case, be a matter of degree as to whether or not the creator of the derivative work has put in sufficient time, effort, judgment and skill in the creation of the derivative work to produce an "original" work in which copyright can subsist.

For example, translations of an original literary work from one language to another are the product of sufficient time, effort and skill that the translations themselves are treated as original literary works. So much so, that it has been stated as a proposition of law that a translation is an original literary work without any further inquiry. 15 The "author", of the
translation, the translator, will generally be the first owner of the copyright in the translation.\textsuperscript{16}

New arrangements of an existing musical composition may or may not be protected as independent original works depending upon the amount of effort involved in adapting the original composition to the arrangement. The question of "what degree of originality is required to give rise to a separate copyright in an arrangement or adaptation of [a] song" \textsuperscript{17} was before Goff, J. in \textit{Redwood Music Limited v. Chappell & Company Ltd.}\textsuperscript{18} After reviewing the expert evidence which had been led at trial, Goff, J. concluded,

"It is perfectly plain that every musical arranger has a number of weapons in his armory which he may use, depending upon the purpose for which the arrangement is required — ranging from simple arrangements for straight dance bands or for some singers, to more sophisticated original arrangements for more substantial orchestras or for groups; but in nearly every case the musical arranger will so decorate, develop, transfer to a different media, or otherwise change the simple music of a popular song as to make his arrangement fall within the description of an original musical work and so be capable of attracting an independent copyright." \textsuperscript{19}
An abridgment of an existing literary work is a derivative work and again the question of whether or not the derivative work attracts copyright is one of fact. As stated by Lord Atkinson in MacMillan and Co. Ltd. v. Cooper,"the precise amount of knowledge, labour, judgment or literary skill or taste which the author of any book or compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree." 20

Many artistic works are also derivative works. A photograph, which is included within the definition of artistic work, 21 will, for example, be a derivative work where the subject matter of the photograph is an existing artistic work, such as a painting or a statue. 22 The photograph will be the subject of copyright, assuming that it otherwise qualifies, as long as it is an original work - originality referring to the photograph, not to the subject matter of the photograph. Therefore two photographs of the same subject can each be an original work but a photograph of an existing photograph would be a mere copy of the first and therefore not an original work.

Engravings, which under the present statute are protected as artistic works, 23 can be derivative works as well. "The engraver, although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies; - means which require great labour and
talent."24 It is the exercise of this individual labour and talent which satisfies the "originality" requirement of the Canadian Act. So if an engraver copies not just the subject matter of his engraving, but also an engraving, the requisite original labour and talent will be lacking and the second engraving will not be protected as an artistic work. For photographs and engravings, at least, it then seems that the effort and skill involved in transferring the existing work into the new medium will satisfy the statutory originality requirement.

Under s. 4(3) of the Canadian Act sound recordings, or mechanical contrivances by which sounds can be reproduced, attract their own copyright, independent of the copyright in the compositions recorded, "in like manner as if such contrivances were musical, literary or dramatic works."25 That section does not distinguish between those derivative works where the underlying work is in the public domain and those where it is not, but there is an obiter dictum in the recent judgment of the Supreme Court of Canada in Compco Co. Ltd. v. Blue Crest Music Inc. 26 to suggest that copyright only subsists in a mechanical contrivance where the composition recorded is currently protected as a musical, literary or dramatic work. Estey, J. stated, "[T]hus [s.4] s.s. (3) brings into being another copyright, that is the record itself, where a musical work in which copyright subsists under s. 3 is recorded."27 Since this qualification of the scope of s. 4(3) did not bear on the appeal in question, and since there does not appear to be any basis in the statute or case law for so restricting the copyright in mechanical contrivances, it is suggested that this dicta should be
treated per incuriam.

A motion picture of cinematographic film of a literary, dramatic or musical work will be a dramatic work "where the arrangement or acting form or combination of incidents represented give the work an original character"; 28 that is, the film itself can be a dramatic work independent of the copyright, if any, in the material filmed. Where the "original character" is lacking, the cinematographic production is still protected as a series of photographs which, as indicated above, fall within the definition of artistic works. 29

While this survey by no means provides an exhaustive list of possible derivative works, it offers a sufficient range of illustrations to explain within the present framework of Canadian copyright law how a variety of derivative works are protected and demonstrates that a derivative work will generally meet the statutory criterion of originality. In the case of a derivative work produced in the same medium as the underlying work, such as a musical arrangement or adaptation, or a literary abridgement, it will be a question of degree as to whether or not sufficient time, energy, skill and experience has brought into existence an "original" work. In the case of a derivative work produced in a different medium, such as a foreign translation, or a two-dimensional reproduction of a three-dimensional artistic work, the effort involved in transferring media will, in itself, constitute sufficient independent contribution to produce an "original" work. Those "technological" works which are specifically dealt with in the statute, such as photographs, sound recordings or cinematographic films, would fall into this latter category.
With respect to this latter group of derivative works, it should be made clear, in order to eliminate any uncertainty arising from the Compco Co. Ltd. case, that the question of copyright in the derivative work should not be in any way dependent on the copyright status of the underlying work. Otherwise there does not appear to be any compelling need for legislative reform on the question of the acquisition of copyright by a derivative work. The case by case approach to the issue of copyright in a derivative work accords with the judicially developed test of originality, which itself reflects a sensible balancing or the rival interests of the original creator, the derivative creator and the general public. More precise standards may result in undue influence being given to one of these interests in some fact situations. Certainty must here be sacrificed for a needed degree of flexibility.

There still remains the question of whether or not the statute should first specifically state, as does Article 2(2), that there can be copyright in a derivative work, and second, codify the present originality test. None of the three Canadian studies on reform of the law of copyright has addressed the issue.30 The Whitford Committee 31 raised the matter in relation to new arrangements of musical works, and while it acknowledged that the law in the United Kingdom was substantially as stated above, it concluded that there was no need to incorporate that view in any future revision of the copyright statute. While the present approach does not appear to have generated any confusion which could be eliminated by statute, since a number of the proposals contained in the text which follows are premised on a legislative scheme which expressly
recognizes a separate category of derivative works, it is recommended that a provision similar to Article 2(2) be included in the new copyright statute.

Infringement of the Copyright in the Underlying Work via the Derivative Work

Once it is accepted that a derivative work can be protected as an "original work", the next problem is to determine the legal relationship between the underlying and derivative work. More precisely, can the production of a derivative work infringe the copyright in the underlying work, and if so, does this affect the copyright status of the derivative work? As with the preceding issue - copyright in a derivative work - no single approach can be said to apply to all classes of derivative works but, as above, the answers in any given case are more certain in relation to some derivative works than to others.

"It is trite law that there can be no copyright in an idea or concept";32 copyright protects only the form in which the idea or concept is expressed. This principle, often cited by Canadian courts in infringement actions, forms the cornerstone of our law of copyright. But as applied in the context of derivative works and infringement, the idea/expression dichotomy is not nearly as sacrosanct as the above quotation would suggest.33

Section 17 of the Canadian Act defines infringement in terms of doing an act, without the consent of the owner of the copyright, which under the statute only the owner of the copyright has the right to do.
The exclusive rights of the copyright owner are contained in s. 3(1) where copyright is defined in part as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever", to perform the work or any substantial part thereof in public, or "if the work is unpublished, to publish the work or any substantial part thereof." Section 3(1) also provides that copyright "includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work;
(b) in the case of a dramatic work, to convert it into a novel or other nondramatic work;
(c) in the case of a novel or other nondramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;
(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph, if the author has given such work an original character; but if such original character is absent the cinematographic production shall be protected as a photograph."
The statute thus expressly provides that the owner of the copyright in the underlying work has the sole right to produce certain derivative works such as translations, dramatizations, novelizations, phonograph records and cinematographic films. By granting the owner of copyright the sole right to produce the work in such varied forms, it seems clear that Canadian law has moved a considerable way from the proposition that all that the law of copyright protects is the author's form of expression.

But a number of the derivative works discussed earlier are not expressly mentioned in s.3. The Canadian Act does not, for example, grant the owner of the copyright in a musical work the exclusive right to make new arrangements of his composition. By contrast, the United Kingdom Copyright Act, 1956 grants the owner of copyright in a literary, dramatic or musical work an "adaptation" right which is defined to include in the case of a musical work, the right to arrange or transcribe the work. 34 In Canada the owner of the copyright in a musical work would only be able to claim the exclusive right to make a musical adaptation or arrangement if it would be said that the particular adaptation or arrangement was caught by the introductory part of s. 3(1), that is if it reproduces the musical work or any substantial part of it in a material form. This was the approach taken in Austin v. Columbia Graphophone Company Ltd., 35 decided under the United Kingdom Copyright Act, 1911 where Astbury, J. found that the defendants had infringed the plaintiff's copyright in his music by making an orchestral score and band parts in which substantial parts of the plaintiff's
music had been reproduced. Infringement in the case of a musical arrangement is not a question of note by note comparison, but whether the substance of the original copyright work has been taken; in each case it will be a matter of degree.\textsuperscript{36} This question – whether there has been a substantial reproduction of the plaintiff's work – is the focal point of many copyright infringement actions, and in determining whether there has been substantial reproduction in such a case courts assess what has been reproduced by the defendant in both qualitative as well as quantitative terms.\textsuperscript{37}

The Rome Revision of the Berne Convention expressly provides that adaptations and musical arrangements may be unlawful reproductions. Article 12 reads as follows:

The following shall be specially included among the unlawful reproductions to which the present Convention applies: Unauthorized indirect appropriations of a literary or artistic work, such as adaptations, musical arrangements, transformations of a novel, tale, or piece of poetry, into a dramatic piece and vice versa, etc., when they are only the reproduction of that work, in the same form or in another form, without essential alterations, additions, or abridgements and do not present the character of a new original work.
The substance of the Article 12 adaptation right has been incorporated, in part, in the Canadian Act. For example, in the case of the dramatization right, the combined effect of s. 3(1)(b) and s. 17(1) is to render an unauthorized dramatization an act of infringement. But the statute is silent on other types of derivative works expressly provided for in Article 12 such as musical arrangements. Decisions like Austin v. Columbia Graphophone Ltd. illustrate that the general "reproduction of substantial part" provision contained in s. 3(1) may, for the most part, provide the owner of the copyright in the underlying work with adequate protection, but in order to conform to Article 12 and in the interest of certainty it is recommended that the future Canadian statute include an exclusive adaptation right.

The Canadian Act in like manner does not expressly provide the owner of the copyright in an artistic work with a right to produce derivative works based on that work. But again, the language in s. 3(1), -- "reproduce the work or any substantial part thereof in any material form whatever" -- is wide enough to encompass such a right. So, for example, in Chabot v. Davies, Crossman, J. held that the copyright in a building plan had been infringed by the production of a shop-front which "reproduced" the plan. In each case it will be a matter of degree as to whether the derivative work reproduces a substantial part of the original artistic work. Keyes and Brunet recommended that the new copyright act expressly grant the right to reproduce a two-dimensional work in three dimensions.
or vice versa.42

There is, at present, a parallel in the approaches taken in the law to the problem of copyright in a derivative work and the questions concerning the rights of the owner of the copyright in the underlying work to produce derivative works. Certain derivative works, by the very effort involved in transforming media qualify as original works, while with other derivative works it is a question of degree. Similarly the right to produce certain derivative works is expressly granted to the owner of the copyright in the underlying work, while with other derivative works it is a question of degree whether or not the particular derivative work can only be produced with the consent of the underlying copyright owner. But even with respect to certain of those derivative works the unauthorized making of which is expressly prohibited in the present act, it will be a question of degree whether any particular derivative work produced is sufficiently derivative to fall within the exclusive rights of the underlying copyright owner.

Whenever the consent of the owner of the copyright in the underlying work is required to produce a derivative work it follows that the making of such a work without the consent of the copyright owner of the copyright in the underlying work will be an act of infringement within the meaning of the Canadian Act. This conclusion leads us to the next problem. If a derivative work is produced in infringement of the copyright in the underlying work, does this affect the copyright status of the derivative work? Or put more simply, is there copyright
in an infringing copy?

Copyright in an Infringing Derivative Work

If "originality" and "infringement" or, more precisely, if "originality" and "reproduction" were conceptually linked, the question of whether there is copyright in an infringing derivative work would be less likely to arise, since a finding of infringement would generally involve a finding of reproduction without consent, and that finding of reproduction itself would negate originality. Indeed, there are some isolated references both in academic writing and in the case law which suggest that the two issues are directly related, with one the antithesis of the other. In Richardson, The Law of Copyright, in reference to the statutory requirement of originality contained in the United Kingdom Copyright Act, 1911 it is said that "[t]he work must be original but that seems to mean no more than it must not infringe the copyright in a copyright work." That treatise was written soon after the enactment of the United Kingdom Copyright Act, 1911 and in the light of more modern texts should be treated with caution. When the matter is approached from the other direction, looking at the question of infringement, some courts have indicated that the issue turns on whether the alleged infringing object is or is not an original work. For example, in Joy Music Ltd. v. Sunday Pictorial Newspapers (1920)Ltd. McNair, J. was of the opinion that a defendant who has bestowed such mental labour upon a plaintiff's work and subjected it to such alteration as to have created an "original work" cannot be considered to have infringed the plaintiff's copyright in his work. This approach to copyright infringement appears to be consistent with Article 12 of the Berne Convention which provides
that unauthorized adaptations, arrangements or transformations are unlawful reproductions "when they are only reproductions ... without essential alterations, additions or abridgments and do not present the character of a new original work" [emphasis added]. But the test applied expressly in Joy Music Ltd. and implicitly in Article 12 does not accurately reflect the way in which the issue of infringement is generally approached in Canadian copyright law.47 Theoretically a work can substantially reproduce an earlier work and therefore infringe the copyright in the underlying work, yet at the same time involve sufficient original effort to receive its own copyright. It may be contended that in this sense Canadian law fails to conform to the Berne Convention but this is overstating the case. Article 12 simply provides that certain derivative works shall be included within the category of unlawful productions. Article 4 would still permit a country through its domestic copyright law to render the making of other derivative works without consent acts of infringement. Article 12 must also be read in light of Article 2(2), which provides that translations, adaptations and arrangements of music "shall be protected as original works without prejudice to the rights of the author of the original work."48

The quite separate question of whether an infringing derivative work can itself be the subject of copyright is not addressed in the Canadian Act or the Rome Revision of the Berne Convention. The original Berne Convention of 1886 did, however, touch on the problem. Article 6 provided that "[l]awful translations are protected as original works". [emphasis added]. Under the
Berlin Revision of 1906, Article 6 was expanded to form part of Article 2, which provides that translations, adaptations, arrangements and other reproductions in an altered form are protected as original works. The new article, however, omitted the "lawful" qualification, and this approach has been followed in all subsequent revisions of the Berne Convention. No equivalent limitation is found anywhere in the Canadian act so that if there is a rule prohibiting copyright in infringing derivative works it is because such a limitation is to be implied in the Canadian Act.

Surprisingly there has been little discussion of the problem. Recently however two cases, one English and one Canadian, have dealt with the topic in relation to different derivative works - in each case with a different result.

In Redwood Music Ltd. v. Chappell Co. Ltd., counsel for the plaintiff submitted that no copyright could subsist in a musical arrangement made in infringement of the copyright in the original work, citing Gramophone Co. Ltd. v. Steven Carwardine and Co. Ltd. for the proposition. The latter case concerned the provision in the Copyright Act, 1911 which formed the basis for s. 4(3) of the Canadian Act, the section which creates copyright in mechanical contrivances. Goff, J. quickly disposed of Steven Carwardine and Co. Ltd. on the basis that there Maugham, J. had merely proceeded on the assumption, without deciding the question, that there could only be copyright protection under the Copyright Act, 1911 in respect of records lawfully made. Hence, it was not authority for the proposition cited. Mr. Justice Goff then concluded that
counsel's submission required the court to in effect insert the word "lawful" into the present statute and that he was not prepared to do.

The Canadian decision, *Compco Co. Ltd. v. Blue Crest Music Inc.*, \(^5\) raises precisely the problem discussed in *Gramophone Co. Ltd. v. Steven Carwardine and Co. Ltd.*, that is, must a mechanical contrivance be produced with the consent of the owner of the copyright in the work recorded to be protected under the statute? Prior to *Compco Co. Ltd.*, it would appear that in Canada the view, as stated in *Fox*, was that "in order for the special copyright to subsist, the record must have lawfully come into existence, that is, without being an infringement of the copyright of the owner of the original work."\(^5\) *Fox*, however, cites *Gramophone Co. Ltd. v. Steven Carwardine and Co. Ltd.* as authority for the proposition and, as Goff, J. explained in *Redwood*, the case stands as a somewhat questionable authority. Nevertheless the same position was adopted in *obiter dicta*, \(^5\) in *Compco Co. Ltd.* by Estey, J., speaking for the Supreme Court of Canada.

Thus Canusa, ... might, if authorized by the owner of the recorded musical work, be the owner of the copyright in the record. However, the recording of the work was not authorized... No unauthorized exercise of the owner's mechanical rights in a work can produce in the wrongdoer a copyright in the resultant record.\(^5\)

Estey, J., who does not offer any authority for his interpretation of
s. 4(3) seems quite willing "to interpolate" in Goff, J's words, into the Canadian statute a "non-infringing" requirement for mechanical contrivances. In the case of other derivative works, such as, for example, a new arrangement of a musical work, is a similar limitation to be implied? Fox, in another context, notes that "[t]he copyright in the maker of the record is somewhat similar to the copyright obtainable by a person who makes a substantially new arrangement or adaptation of the musical work composed by another." Does this similarity warrant parallel treatment with respect to this issue, and if so, what of all other derivative works which also can be analogized to the mechanical contrivance? No answer is forthcoming in the case law. Like so many issues in Canadian copyright law, there is dearth of authority on point. It could be argued that since the copyright in mechanical contrivances is "special", the dicta in Compco Co. Ltd., if followed at all, should be restricted to the case of mechanical contrivances. This approach would engage the court in the least amount of judicial amendment of the Canadian Act as well as restricting the possibilities of conflicts with our Convention obligations. But most importantly, the proposition that, as a general rule, there cannot be copyright in a derivative work produced in infringement of copyright rests on a very weak policy foundation. Over fifty years ago, Mann, J. summed up the problem in the following manner: "[w]hy should copyists be permitted to steal the fruits of the [author of the derivative work]'s labours merely because [the author of the derivative work] cannot produce a licence from a stranger to the dispute, who may be wholly indifferent as to his own rights?" To deny copyright in a derivative work which otherwise meets the statutory requirements, in
particular, the criterion of originality, on the grounds that the derivative work itself was produced in infringement of another's right would allow precisely that which Mann, J. describes. Copyists would be unjustly enriched at the expense of the derivative author. Thus it is recommended that the new statute make it clear that copyright can subsist in every original literary, dramatic, musical or artistic work even where the production of such a work infringes the copyright in some earlier work. Practical problems of enforcing the rights in a derivative work, especially an infringing derivative work, have to be sorted out. But to deny the author of an infringing derivative work copyright in his work would, as Mr. Justice Goff concludes, "offend[s] against justice and common sense". 60

Enforcement of the Rights in a Derivative Work

Copyright in a derivative work provides the owner with the sole right to do or authorize the doing of any of the acts described in s. 3(1) of the Canadian Act. When such an act is done without the consent of the derivative copyright owner, s. 17 deems it to be an act of infringement thereby entitling the copyright owner to a variety of forms of civil relief. 61 But that same act done without the consent of the owner of the copyright in the underlying work may also infringe that copyright. In this way, an act may constitute two separate acts of infringement and give rise to two distinct infringement claims.

Where the alleged infringer does a prohibited act in relation to only part of the derivative work, in determining whether the copyright
in the derivative work has been infringed, the court will look at the quality of the part taken. If the part taken consists mainly of extracts from the underlying work, and therefore, as far as the derivative work is concerned, is not original, it is unlikely that a court would find that, irrespective of the quantity taken, a "substantial part" of the derivative work has been appropriated without consent, and thus there would be no infringement of the copyright in the derivative work. 62

The derivative copyright owner may license others to do those acts enumerated in s. 3(1) and insofar as the derivative copyright is concerned such consent operates to negative infringement. But a licence granted by the owner of the copyright in the derivative work only protects the licensee vis à vis the licensor. In other words, that licence cannot be set up in defence of an infringement claim by the owner of the copyright in the underlying work. 63 The licensee in such a case must either wait for the copyright in the original work to expire or negotiate an additional licence with the owner of the copyright in the underlying work. Failing either of these, the licensee must simply hope that the owner of the underlying copyright will not choose to intervene and enforce his rights.

Even the owner of the copyright in a derivative work which has been produced with the consent of the underlying copyright owner may infringe the latter copyright through subsequent acts of exploitation of his derivative work. Take the case of a new arrangement of a musical work. "Normally, of course, the
licensure to make the arrangement or adaptation will carry with it a licence, for example, to perform the adaptation.\textsuperscript{64} But it need not, and if it does not, as Maugham, J. explains in Gramophone Co. Ltd. v. Carwardine & Co. \textquotedblleft[t]he rights of the adapter are subordinate to the rights of the composer, who is entitled to an injunction to restrain the performance [in public] of a new arrangement of his musical work so long as his copyright is still subsisting.\textsuperscript{65} So, like his licensee, the adapter would have to obtain a performance licence from the composer or otherwise wait until the composer's copyright had expired.

The foregoing summarizes the general legal position of the owner of the copyright in a derivative work but there remains the question of whether the owner of the copyright in an infringing derivative work is treated differently. One possible view is that courts will not allow themselves to be used to protect the derivative work copyright owner's rights against a would-be infringer.\textsuperscript{66} This is not to say that copyright does not subsist in the derivative work, but rather that the derivative author's status as an infringer makes him unworthy of protection - \textit{ex turpi causa non oritur actio}.

A parallel here can be drawn to the case of those works which can be described as obscene, immoral, indecent, or irreligious. Under the Copyright Act of 1875\textsuperscript{67} copyright was expressly denied to "immoral, licentious, irreligious or treasonable or seditious" works. Unlike the earlier statute however the Canadian Act purports to grant copyright in every original literary, dramatic, musical and artistic work irrespective of the character of the work.
Nevertheless, Fox states "[g]enerally speaking it may be said that ... the court will not intervene to protect such a work from infringement." 68 No Canadian case, however, has gone so far as to say that "infringing" works should be lumped within the above category of works. Nor should it, for the interests involved are quite different. The public policy prompting the position adopted with respect to the category of works listed by Fox reflects concerns quite external to the Canadian Act, while the only basis upon which a court could refuse to enforce the infringing derivative copyright owner's rights would be that the individual has contravened the very legislation that he is seeking to enforce. If such contravention, in and of itself, should disentitle a copyright owner to rights granted by the statute, this is a matter to be dealt by the statute and since the Canadian Act is silent on the matter, it is submitted that there is no sound basis for refusing to enforce the rights of the owner of the copyright in a derivative work.

Prima facie, then, if any one other than the owner of the copyright in a derivative work or someone acting with his consent, does a restricted act in relation to the derivative work that act will be one of infringement. It is not clear, however, what rights the derivative copyright owner has against the owner of the copyright in the underlying work. Consider, for example, a case where one translates a literary work into a foreign language without the consent of the owner of the copyright in the original work. If the owner of the underlying copyright reproduces copies of the unauthorized translation, can he be sued by the translator? While the Canadian Act grants the translator the "sole right to
reproduce his "work", it also gives the author, as first owner of the copyright, the "sole right" to reproduce "any" translation of his work. Each individual can assert his "sole" right against a third party infringer which in the hypothetical case would be someone who reproduces the translation without the consent of either copyright owner. The potential for conflict between those two exclusive rights however could arise in the context of an infringement claim brought by the derivative copyright owner against the underlying copyright owner. The underlying copyright owner would raise as a defence the clear grant of statutory authority to do the act in question. Neither the Canadian Act, nor the existing case law directly addresses the matter. How then is this apparently irreconcilable conflict in the statutory scheme to be resolved?

First it should be noted that, in practical terms, it is unlikely that this problem will frequently arise. In many cases one person will own the copyright in both the underlying work and derivative work. Or, even if ownership of the two copyrights is divided, there will often be an agreement between the two owners pursuant to which the derivative author is given consent by the underlying owner to produce the derivative work, and that agreement may speak either expressly or impliedly to the question of consent to reproduce the derivative work. But when there is no consent, and the underlying author seeks to exploit another's derivative work based on his original work the difficulty surfaces, and it is for this case, that the law must provide an answer.
Either obvious solution — to allow the underlying author to exploit another's work with impunity or to allow the derivative author to assert rights against the underlying author — necessarily involves a departure from the language of the Canadian Act. Thus the objective must be to fashion a solution which least departs from the statutory scheme and most closely accords with the basic principles of Canadian copyright law.69

Generally the law treats the rights of the derivative copyright as subordinate to the rights of the underlying copyright. So as Maugham J. explains in Gramophone Co. Ltd. v. Stephen Carwardine and Co. Ltd.70 the underlying copyright owner can restrain the exploitation of the derivative work by the derivative author. This principle of subordinating the derivative copyright has been adopted without any clear domestic legislative authority, although the approach appears to be consistent with Article 2(2) of the Berne Convention, which provides that "translations, adaptations and arrangements are to be protected as original works" but "without prejudice to the rights of the author or the original work."

Assuming general acceptance of, and adherence to, a policy of subordinating the derivative copyright, can the owner of the underlying copyright rely on this policy to defend an infringement action? In other words can the legal effect of subordinating the derivative copyright be a negation of infringement, so that for example the owner of the copyright in the literary work described above would not infringe the copyright in the translation by reproducing it without consent? The
answer, in my view, must be no. It is one thing for the law to subordinate the exercise of certain legal rights, and quite another to deny the possessor of legal rights, even if they are subordinate rights, the right to complain about an infringement of those rights. To sanction the latter approach would be to allow the underlying copyright owner to appropriate for his own benefit the intellectual product of another. This in turn would conflict with the very premise underlying Canadian copyright law, that the author of an original work has the right to prohibit any unauthorized reproduction of his work. The underlying author or his assignee has at least two choices; he can restrain the further reproduction of the derivative work by the derivative author or he can independently produce and exploit his own derivative work. But he ought not be permitted to take with impunity the efforts of another.

If the foregoing analysis is accepted, this would mean that the derivative copyright could seek to restrain the underlying author from reproducing the former's derivative work. But perhaps this particular situation warrants some compromise such as could be achieved by restricting the range of civil remedies available to a plaintiff derivative owner in such an infringement action. While the underlying owner would be precluded from reproducing the derivative work without legal consequences, he could not be restrained from doing so. The owner of the subordinate copyright would be limited, as far as the underlying author is concerned, to monetary relief, damages, and or, an account of profits, in other words, a forced licence fee. This in effect would amount to a restricted de facto compulsory licence. Any compulsory licence, either in the
traditional sense or as proposed here, operates as an exception to and limitation upon the author's exclusive rights and thus can only be justified if granted to accomplish some further policy objective. Presumably most legislative decisions to cut back on the author's exclusive rights are premised on the public interest in having greater access to the creator's work. In this case, however, the competition in interests is between the derivative author on the one hand, and the underlying author not the public, on the other, and it is far from clear that the balance favours the underlying author.

"Infringing Copies"

Under s. 21 of the Canadian Act "infringing copies" of a work, or any substantial part of it, in which copyright subsists and all plates used or intended to be used for the production of the infringing copies are deemed to be the property of the owner of the copyright. It has been held that there cannot be an infringing copy without an act of infringement having occurred. Section 21 further provides that the copyright owner may take proceedings for the recovery of the possession of the infringing copies or in respect of the conversion thereof. An order for possession made on the basis of s. 21 is distinct from an order for delivery up. The latter, a discretionary form of relief available in intellectual property cases, in general and apparently in copyright issues permits a court to order that goods which are the property of one person, but whose production infringed the rights of another person, be delivered up for the purpose of their destruction. Because of the obvious waste inherent in such a ruling, courts have generally been reluctant to make an
order for delivery up. An order for possession on the basis of s. 21 of the Canadian Act is theoretically quite different. There the plaintiff, as property owner, is seeking recovery of his property. Nevertheless, courts are also reluctant to make an order directing delivery of possession of infringing copies. According to Taggart, J.A., in Netupsky v. Dominion Bridge Company Limited, a court should refuse to make an order for possession in circumstances similar to those in which orders for specific delivery are refused in detinue cases. In general then, a copyright owner, who can prove an act of conversion, will be left to claim damages for conversion. Conversion damages and damages for infringement of copyright are cumulative, not alternative forms of relief, although both remedies cannot be awarded in such a manner as to yield a duplication of remedies.

The measure of damages in conversion is the value of the goods converted at the date of conversion. Thus damages are to be calculated on the basis of the total value of an "infringing copy" and are not to be limited to the increment in the value of the infringing copy which can be attributed to the copyright infringement. The measure of damages for conversion in a copyright case can be extremely high. Consider, for example, the value of an infringing copy engraved on a silver chalice or a gold medallion - examples recently cited by Lord Scarman in order to illustrate the possible impact of applying a comparable provision in the United Kingdom Copyright Act, 1956. After making the point, Lord Scarman added that "if the possibility of excess damages is to be eliminated, legislation would be needed for the language of the subsection permits of no
other construction."81

What of derivative works? Can they be "infringing copies" with the result that the owner of the copyright in the underlying work, while not thereby the owner of the copyright in the derivative work, nonetheless owns the physical object which embodies the derivative work? Section 2(j) provides that "infringing", when applied to a copy of a work in which copyright subsists, "means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act."82 Since, as discussed above, the production of a derivative work can infringe the copyright in the underlying work, the only question in a case where the derivative work is produced in contravention of the statute is whether or not the derivative work is a "copy" of the underlying work; for example, is a translation of a "copy" of the original work translated; or is a record a "copy" of the musical composition recorded?

The word "copy" is undefined in the statute. This is in contrast to the United Kingdom Copyright Act, 1956 which defines "infringing copy" in terms of "reproduction", the latter term itself defined quite widely in the statute. 83 In Canada, the matter, left to the resolution of the courts, has not been addressed in any systematic or satisfactory manner. Indeed, the law is no clearer today than it was over a century ago when in Dicks v. Brooks, Lord Bramwell intervened and instructed counsel that as far as that appeal was concerned "[T]he question is, what is a copy?"84 The question remains largely unanswered.85

It is instructive to examine cases decided prior to the enactment
of the present copyright statute, or more precisely, prior to the enactment of the United Kingdom Copyright Act of 1911, when the issue of copyright infringement often turned on whether or not the defendant had produced a "copy" of the plaintiff's work. It has been held that a phonograph record is not a "copy" of a sheet of music.\textsuperscript{86} As well, there is early authority to the effect that a translation is not a "copy" of the book translated\textsuperscript{87} and that a dramatization is not a "copy" of the original novel dramatized.\textsuperscript{88} But an arrangement has been treated as a "copy" of the composition arranged,\textsuperscript{89} and a photograph has been held to be a "copy" of an engraving.\textsuperscript{90}

The Canadian Act expanded the notion of infringement by granting certain specific exclusive rights to the copyright owner, so that, as discussed above, the production of a phonograph record infringe the copyright in the musical work recorded, a translation the copyright in the book translated and a novelization copyright in the drama novelized. If produced without consent, are these derivative works "infringing copies"? In other words, does the word "copy" in the expression "infringing copies" have any independent meaning or does copy simply mean the physical embodiment of an act of infringement?

As a matter of principle, it seems inconsistent to grant the creator of a derivative work an independent copyright in his work and at the same time to say that every physical copy of that work and even the plate used to make the derivative work belongs to another. Further, it seems to be stretching the meaning of the word "copy" beyond any reasonable limits to say that certain
derivative works are "copies" of the original work. To do so, moreover, poses considerable practical problems. Consider the case of A writing a book, B translating the book into another language and C copying B's translation without consent. Applying the principles discussed above, it is clear that the single act of C reproducing the translation infringes two copyrights, and opens up the possibility of two separate actions being commenced against C. But s. 21 also deems each of C's copies of the translation to be the property of B, while at the same time if B's translation is an infringing copy of A's literary work, then A is deemed to be the owner of the infringing copies produced by C. In other words, s. 21 deems two individuals to be the owner of the same piece of property.

Looking to more modern case law, as stated above, it appears that little consideration has been given to the meaning of the word "copy" in the term "infringing copy" with the one exception in the case of phonograph records of musical compositions. Over half a century ago in Albert v. S. Hoffnung & Company Ltd., Harvey, J., when confronted with this problem, concluded that "records clearly are copies within the meaning of the Act." He then determined that the particular records were infringing copies of the musical work in question and made an order for the delivery of the phonograph records over to the plaintiff. Fox suggests that Hoffnung correctly states the law in Canada, so that phonograph records can be "infringing copies" of musical works. What Fox fails to point out is that the United Kingdom Copyright Act, 1911 adopted in Australia by the Copyright Act (Federal) 1912 did not provide a general definition for
the term "musical work." So in holding that a record could be a "copy" of a musical work, the court in Albert v. S. Hoffnung & Company Ltd. was not restricted in any sense by a legislative definition of musical work. The Canadian Act does, on the other hand, define "musical work" at s. 2(p) to mean "any combination of melody and harmony, or either of the, printed, reduced to writing or otherwise graphically produced and reproduced." This definition is taken verbatim from the United Kingdom Musical (Summary Proceedings) Copyright Act, 1902. In a prosecution under that statute in Mabe v. Connor it was held that a perforated music roll for use in a player piano was not a pirated "copy" of a "musical work". According to Walton, J., a "copy" of a musical work had to be "either in print, or in writing, or in some graphic form".

Given the definition of musical work found in the Canadian Act it is submitted that Mabe v. Connor, not Albert v. S. Hoffnung Company Ltd., should be accepted as good authority on the question of whether records are copies of musical works under Canadian copyright law. On this basis, the law in Canada would be precisely the opposite of that stated by Fox. And the recent decision of the Federal Court of Appeal in Canusa Records Inc. v. Blue Crest Music accords with this view. Without referring to the above authorities, J ockett, C.J. in that case analyzed the relevant Canadian statutory provisions in like fashion as had the court in Mabe v. Connor, and concluded that mechanical contrivances could not be "copies" of musical works. Only written or other graphic reproductions of music can be "copies" of a "musical work" within the
meaning of the Canadian Act. Accordingly, records cannot be infringing copies of musical works for the purpose of s. 21.

The meaning of "infringing copy" in relation to other derivative works remains unsettled, but in approaching the matter, it is important to bear in mind, as Jackett, C.J. emphasized in the Canusa Records Inc. case, "s.21 is 'confiscatory' in nature and must, accordingly, be read strictly."

Indeed, the extraordinary nature of s. 21, given the wide range of alternate forms of civil relief already available under the statute, has led many to question the utility of retaining the provision. As a practical matter, as noted above, the remedy provided by s.21 may be excessive. Keyes and Brunet, acknowledging the problems which s. 21 raises and following the recommendations of the Isley Report, proposed that s. 21 be revised in order to distinguish between innocent and guilty infringers. Under the proposed scheme a guilty infringer would be liable either to deliver up infringing copies without compensation or to pay damages if the infringing copies are retained, while in the case of an innocent infringer, the copyright owner would have the option of taking the infringing copies at cost or leaving them with the infringer with a subsequent accounting of profits. The Whitford Report, on the other hand, has recommended that a similar provision in the United Kingdom Copyright Act, 1956 be abolished altogether. It is difficult to predict the fate of the deemed ownership provision in any future legislation. But in the event that the
new Canadian copyright statute retains s. 21 in its present form or in some modified version, the legislation should more clearly define "infringing copy", with particular attention to the question of derivative works.

To that end, it is proposed that the question of whether an infringing derivative work is or is not an "infringing copy" of the underlying work, should be approached by asking whether copies of the derivative work do or, at least could, compete with copies of the underlying work. If the copies of the derivative work infringe copyright in the underlying work, and compete with copies of the underlying work, in the sense that the demand for copies of the latter may be reduced as a result of the availability of copies of the former, the copies of the derivative work would be "infringing copies." In a case where actual or potential competition is absent, even though the production of the derivative work may infringe the copyright in the original work and provide the copyright owner with a variety of possible forms of relief in an infringement action, the relief provided through the legal fiction contained in s. 21 would not be available. A translation, for example, as it is unlikely to reduce the demand for the original work, would not be an infringing copy. The same would be true of a dramatization of a novel, or a novelization of a drama.

A sound recording of a musical work presents a more difficult case. The availability of sound recordings is unlikely to reduce the demand for copies of sheet music. Indeed, if anything, the widespread circulation of recordings of a work may increase its popularity and accordingly the demand for sheet music.
But to apply the proposed derivative work test for infringing copies to phonographic records or other mechanical contrivances confuses the dual nature of sound recordings or at least perpetuates the confusion generated by an antiquated definition of musical work. While Mabe v. Connor and Canusa Records Inc. v. Blue Crest Music Inc. may be correct as a matter of statutory interpretation, the particular statutory provision is in need of revision. There have already been proposals to abandon the present definition of musical work, which is drafted in terms of the work graphically fixed or sheet music, in favour of one which includes a more liberal fixation requirement. The adoption of such a definition would acknowledge that in one sense a sound recording is not a derivative work at all, but rather a primary work, or more accurately, a medium of fixation for the original musical work. And if a sound recording is not a derivative work then the proposed test for an infringing copy is irrelevant. A sound recording of a musical work would therefore be a "copy" of the musical work and an unauthorized recording would be an "infringing copy" of the musical work.

This still leaves open the possibility of two individuals claiming ownership of the same physical object. Where a lawfully produced record is duplicated without consent the owner of the copyright in the mechanical contrivance can claim ownership of the record as an infringing copy of the mechanical contrivance and the owner of the copyright in the musical work can claim ownership of the record as an infringing copy of the musical work. But this problem is not unique to sound recordings. Whenever a derivative work in which there is
copyright is also found to be a "copy" of the underlying work the result is unavoidable. But under the proposed test this is unlikely to occur since few copies of derivative works will qualify as infringing copies of the underlying work, a result which is sensible for two reasons. First, the proposed approach avoids placing a "strained and artificial" meaning on the historic notion of a copy. Second, it would recognize that s. 21 is an extraordinary remedy which is, "confiscatory" in nature.

The Effect of Withdrawal of Consent on Derivative Works

What is the effect of the subsequent withdrawal of the consent of the owner of the copyright in the underlying work on derivative works produced prior to the withdrawal of consent? The Canadian Act does not attempt to deal expressly with the question unlike, for example, the United States Copyright Act, 1976, so the answer at least under the present state of law must be found by examining many of the above-mentioned principles and related statutory provisions.

Under Canadian copyright law the "consent" to reproduce and further exploit a copyrighted work may come from one of two sources: a licence or an assignment. A licence is nothing more than a permission granted by the owner of the copyright which renders acts which otherwise would infringe copyright, non-infringing. An assignment, on the other hand, operates as a conveyance to the assignee of certain, or all, of the exclusive rights which make up copyright. Unlike a licence which can be granted orally or be implied from conduct, an assignment
must be in writing. As a result of s. 12(4) an assignment can be for whole term of copyright or any part thereof.

A consent once given can, however, be withdrawn. In the case of a licence this can occur either pursuant to some term set out in the licence or through a revocation of the licence by the copyright owner. The revocation of a licence by the holder of the copyright may itself constitute a breach of contract, but nonetheless once the licence is revoked, the licensee's permission to reproduce is gone. It is unclear whether an assignment of copyright in and of itself operates to terminate, especially in cases where the assignee has notice of any such licence, all licences previously granted by the assignor. An assignment cannot be revoked, but there can be a reversion of copyright either pursuant to the terms of the assignment or by operation of law. The latter type of reversion occurs as a result of s. 12(5) of the Canadian Act which provides that, where copyright has been assigned by an author otherwise than by will, any copyright interest of the assignee will revert to the author's legal representative 25 years after the author's death.

Turning now to derivative works, the consent of the underlying copyright owner, as has been explained above, will often be required to produce a derivative work. Assuming the derivative author obtains the requisite permission to produce and exploit his derivative work, he still faces the possibility of either a later revocation of his licence or a reversion of the copyright each of which raises important questions concerning his right to continue to exploit the
fruit of his labours.

As far as physical copies of the derivative work are concerned, one must distinguish between those produced prior to the cancellation of consent and those produced afterwards copies of the derivative work in the former category. Since the act of producing copies of the derivative work in the former category was done with the consent of the owner of the copyright in the underlying work, no infringement of the copyright in the latter work, within the meaning of s. 17(1) will have taken place. Nor are such copies of the derivative work "infringing copies", since pursuant to s. 2 "infringing" when applied to a copy of work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of this Act." (emphasis added)

It is less clear, however, whether the later sale or distribution for the purposes of trade of such copies would be caught by s. 17(4), that is, the secondary or indirect infringement provision. Under that subsection copyright is deemed to be infringed by any person who, inter alia, sells or lets for hire, or by ways of trade exposes or offers for sale or hire "any work that to his knowledge infringes copyright or would infringe copyright if it had been made in Canada" (emphasis added). Can a derivative work produced with consent be said to infringe the copyright in the underlying work when the consent is withdrawn? The problem is that s. 17(4) in its current form is ambiguous. A work cannot infringe copyright; a person doing an act without consent infringes copyright. To
speak in terms of work which "infringes" copyright leaves unanswered the question as to what point consent is relevant and thus, it could be argued that a lawfully produced copy may subsequently become a work that infringes copyright. Support for this position can be found in a case which arose soon after the introduction of, and which was decided under, the United Kingdom Copyright Act, 1911. Through that statute the owner of the copyright in a musical work was granted the sole right to make mechanical contrivances by which the work could be performed. As explained earlier, under the prior state of the law, the manufacture of phonograph records did not infringe the copyright in a musical work. In Monckton v. Pathé Frère Ltd., the English Court of Appeal had to determine whether records lawfully produced in England before the introduction of the statutory mechanical reproduction right were, once the right was granted, "works which ... infringe[s] copyright" within the meaning of the forerunner of s. 17(4) of the Canadian Act the sale of which constituted an indirect infringement of copyright. The Court of Appeal concluded that they were. Since Monckton v. Pathé Frère Ltd., however, the United Kingdom Copyright Act, 1911 has been repealed and the equivalent provision in the United Kingdom Copyright Act, 1956, s. 5(2), now expressly stipulates that it is only where the defendant is dealing in articles, "the making of which " constituted infringement of copyright, that a claim of secondary infringement can arise. In this sense s. 5(2) matches the language used in the present Canadian statute in defining "infringing" for the purpose of infringing copies. Notwithstanding the confusing manner in which s. 17(4) is drafted it seems reasonable to assume that a Canadian court, given the opportunity, would interpret s. 17(4) in a manner which corresponds
to the present drafting of the United Kingdom provision. If this view is correct, or if the forthcoming statute were to be amended on this point, then it could safely be said that no commercial distribution after the cancellation of consent of existing copies of the derivative work would result in copyright liability.\textsuperscript{123}

The production of any copies of the derivative work after the cancellation of consent would, however, infringe copyright and there is nothing in the Canadian statute as presently enacted to protect the author of a derivative work. Thus while a person can, for example, lawfully produce a translation of a book and thereby acquire a copyright in that translation, the later reproduction of the translation will permit an infringement action by the owner of the copyright in the original book.\textsuperscript{124} Similarly, a performance in public of a derivative work such as a musical adaptation after the consent has been cancelled may infringe the copyright in the original musical work.

Should a person who created a derivative work with the consent of the underlying copyright owner be entitled to special protection after that consent is removed? Assuming for the moment that this question warrants an affirmative reply then the next question is how can this result be achieved, that is, what legal mechanisms are there for allowing the derivative author to continue to exploit his derivative work? Two possibilities will be suggested here. The first looks to the courts for fulfillment, the second to Parliament.
First, the judicial solution. It is open to a court in any particular case to find on the facts that the owner of the copyright in the underlying work has impliedly licensed the derivative author to continue to exploit the derivative work. For example, in *Solar Thomson Engineering Co. v. Barton*\(^{125}\) it was held that the plaintiffs had impliedly licenced the defendant to reproduce the former's work. The case itself is not particularly useful since the facts are totally unrelated to the topic at hand, but the views of one commentator writing on the case are. In reference to the court's findings of an implied licence he states that this "illustrates a great virtue of the common law: an ability to develop doctrines whereby inequitable results are avoided."\(^{126}\) Is the present problem one which demands a similar result? In order to answer this question one must look to the nature of the consent and how it was cancelled. In the case of an express licence for a fixed term which has expired, or a licence which has been expressly revoked, it would be artificial in the extreme subsequently to find implied consent. But where permission has been revoked through reversion by operation of law, it would not be factually inconsistent to find that the new owner of the copyright has impliedly licensed the former owner or licensee to continue exploitation of the derivative works. In *Redwood Music Limited v. Chappell and Company Ltd.*,\(^{127}\) Goff, J. held that the former assignee of the copyright in certain works, the publishers, who had continued to remit, after reversion, royalties pursuant to the original assignment, were impliedly licensed to continue doing those acts which in the absence of consent would have constituted infringement. The licence was held to remain in force
until the licensee received express notice of revocation. But even this finding of an implied licence is questionable. Although there is nothing factually inconsistent in the conclusion, as a matter of law the result seems to run counter to the intention of Parliament in enacting the reversionary provision: to find a licence in favour of the original assignee after reversion in the absence of any evidence of an agreement being reached by the parties defeats, or at least could defeat, the apparent object of permitting the estates of deceased authors an opportunity to terminate improvident assignment and enter into a better agreement. Even accepting the finding, such as it is, of an implied licence, it is clear that the conclusion only affords very limited protection to the implied licensee after reversion. It is still open to the reversionary beneficiary to revoke the implied licence, and after revocation, as held in Redwood Music Limited, any continued exploitation of derivative works by the former licensee would expose it to liability. Thus it seems unlikely that the implied licence would provide meaningful protection to the owner of the copyright of a derivative work and thus solve the withdrawal of consent problem in Canada.

The other possible approach would be to stipulate expressly in the future statute that certain acts of exploitation of a lawfully produced derivative work shall not be acts of infringement. Under the American Copyright Act of 1909, as under the Canadian Act no such exception was granted. The new Copyright Act of 1976 however does address the problem at s. 203(b)(1):
A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

The termination of a grant referred to in s. 203(b)(1) and dealt with generally in s. 203 corresponds to the reversion of copyright provided for in s. 12(5) of the Canadian Act. Section 203(b)(1) attempts to balance the interests of the reversionary beneficiary in having all rights returned to him and the interests of the derivative author in being able to continue to use the product of his efforts. In this respect the problem is not unique. The same balancing exercise is required throughout the law of derivative works. What is surprising perhaps is that the interests of the derivative copyright are in this instance treated as paramount. The explanation for the result appears to lie in a comparison of the assignee of copyright in a work who makes sufficient original contributions to the work to create a protected derivative work with the assignee who simply exploits the assigned work. Viewed in this manner the former assignee appears more deserving of special treatment. Judge Friendly made precisely this comparison in Rohauer v. Killiam Shows, Inc. and noted that:
"In contrast to the situation where an assignee or licensee has done nothing more than print, publicize and distribute a copyrighted story or novel, a person who with the consent of the author has created an opera or motion picture film will often have made contributions literary, musical or economic, as great if not greater than the original author.130

But does it follow from this that the underlying copyright owner is to be deprived of all rights in the derivative work? Further, s. 203(b)(1) makes no attempt to differentiate between those derivative works involving a substantial original contribution and those which do not. Indeed, derivative work is defined to include such things as editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.131 Many American commentators have criticized both the underlying premise of a section like s. 203(b)(1)132 and as well, the failure, especially in this context, of the American act to distinguish between types of derivative works, and to pinpoint which of the many works caught by the definition warrant special treatment.133

In considering proposals for Canadian copyright reform caution must be exercised in borrowing from the experience in the United States. As Estey, J. warned in Compco Co. Ltd. v. Blue Crest Music Inc.:
The United States Copyright Act, both in its present and earlier forms, has, of course, many similarities to the Canadian Act, as well as to the pre-existing Imperial Copyright Act. However, United States Court decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country.134

With specific reference to derivative works, the Copyright Act of 1976 varies in a number of fundamental respects from the Canadian scheme. For example, s. 103(b) provides that copyright in a derivative work only extends to the new material contributed by the producer of the derivative work and s. 103(a) states that copyright does not subsist in respect of a derivative work or any part of a derivative work unlawfully produced. The matter therefore must be considered in the context of the present Canadian copyright statutory scheme, bearing in mind our obligations under international conventions.

To return now to the assumption made earlier - that the derivative author is entitled to special treatment - one could argue, on principle, that a person who purchases a licence or an assignment to create a derivative work and with that permission produces a derivative work should in the eyes of the law of copyright be viewed differently from an individual who creates a derivative work
without the consent of the underlying copyright owner, thereby infringing the latter copyright. If the infringing derivative copyright owner is granted rights under the act, unlike his equivalent under the American statute, so the argument would continue, surely the author of a lawful derivative work is entitled to something more. The fallacy with this approach, however, is that is fails to acknowledge that under the present state of the law the derivative author does have something more - during the lifetime of his agreement he, unlike the infringing derivative author, can exploit the derivative work with impunity.\textsuperscript{135} Thereafter he must obtain a further consent. To provide otherwise would deprive the underlying copyright owner of his exclusive rights and raise serious problems concerning our convention obligations. Further, in most cases the duration of the licence or assignment is a matter which is freely negotiable, and so in a sense the derivative author must be seen as the "author" of his own misfortune. The victim of a reversion by operation of law is different: he alone cannot be blamed for the predicament posed by the cancellation of consent. But this one troublesome case will likely soon be no more, since it has been proposed that the new Canadian statute, like the United Kingdom \textit{Copyright Act,} 1956 abolish the reversionary provision and this recommendation will probably be followed.\textsuperscript{136}

In conclusion, then, it appears that no change is required in this area of the law; while the owner of the copyright in the derivative work can assert his rights in that work against others, once the consent from the owner of the
copyright in the underlying work is gone and, so long as the copyright in the underlying work subsists, any exploitation of the derivative work may infringe the underlying copyright.

Can a Derivative Work Publish the Underlying Work?

The final issue to be examined is whether acts done in relation to a derivative work can ever effect a "publication" of the underlying work. Section 3(2) of the Canadian Act provides that publication in relation to a work "means the issue of copies of the work to the public." So again, as with the question of infringing copies, one of the principal problems is to determine whether a derivative work is a "copy" of the underlying work. But here the question is whether there has been an issue of lawful "copies" rather than "infringing copies" since generally publication cannot be accomplished by the issue of "infringing copies". This is the result of s. 3(3) which provides that for purposes other than those relating to infringement "a work shall not be deemed to be published if published without the consent or acquiescence of the author." 137

Central to an understanding of this problem is a recognition of the legal significance of publication in the law of copyright. The concept of publication has often been said to be the focal point of copyright law. Lord Wilberforce
recently expressed the proposition as follows:

All through the history of copyright, under the common law, and through the legislation over 280 years, there has been the well known contrast between unpublished works and published works. The distinction lies at the root of the law.  

But while the distinction between a published and unpublished work still plays an important role in the Canadian law of copyright, it can no longer be said to lie at the root of the law. Prior to the enactment of the Canadian Act publication operated to divest common law copyright in unpublished works, but under the present Canadian statute, common law copyright has been abolished and now statutory copyright attaches to both published and unpublished works. Nevertheless, many copyright issues still turn on whether or not publication of a work has occurred. For example, while the general term of copyright is the life of the author plus fifty years, in relation to works unpublished at the date of the author's death, the term is fifty years from the date of publication. In other words, the term of copyright in relation to unpublished works, so long as they remain so, is perpetual. Therefore whether or not publication has occurred may be determinative of the question of whether or not copyright still subsists. The importance of publication in this respect, may be illustrated by the case of a musical composition which has been reduced to writing and also has been recorded on a mechanical contrivance. Assume that the musical work is original and otherwise qualifies for protection under the statute, and further that the author has never made printed copies of the sheet music available to the
public. Finally note that as a result of s. 3(2) a performance in public of the composition does not publish the musical work. Will the issue of records on which the musical composition has been recorded publish the musical work? If so, the copyright owner's right to collect s. 19 mechanical royalties will continue for a period up to fifty years after the author's death. Whereas if the issue of records does not effect a publication of the musical work the right to collect royalties will continue indefinitely. A sound recording, as explained above, may be an unfortunate example to choose because of the peculiar definition of musical work, but nevertheless the hypothetical illustrates the potential significance of a finding of publication.

The date of first publication is thus of obvious significance. So too is the place of first publication. If a work is first published outside a range of territories described in s. 4, (essentially any country other than a Berne Convention country or any country with which Canada does not have a bilateral copyright agreement) then the work is not protected. This is so even if the work was, prior to publication, the subject of Canadian copyright as an unpublished work on the basis of the author's citizenship or residence. And further, if the work was not protected as an unpublished work, the fact that it was first published in Canada or a qualified territory, will not lead to protection of the work under the Canadian statute. In other words, place of first publication is an additional qualifying factor rather than an alternative basis for
Given the consequences that flow from a finding of publication it is of some interest to know whether a derivative work can ever publish the underlying works. The Berne Convention is silent on the matter, and the Canadian Act does not specifically address the question. But the Canadian statute does appear to contemplate the possibility of a derivative work effecting a publication of the underlying work; s. 3(2) provides that "the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works." If a derivative work could not effectively publish the original work then this provision would be unnecessary. So, as above, the problem becomes one of determining when a derivative work is a "copy" of the underlying work, and again, as above, there is little authority dealing with the problem.

One case that at least raises the issue is John Fairfax & Sons Pty. Ltd. v. Australian Consolidated Press Ltd. There the Supreme Court of New South Wales referring to the comparable provisions in the United Kingdom Copyright Act, 1911, suggested that the term "copy" should be given a meaning distinct from that which it has received in the context of "infringing copy". In the Court's view a "copy" is something which is a literal transcription of the original work. Unfortunately no explanation is offered for attributing a narrower meaning to the term copy in reference to publication. Nevertheless, this view can be defended and should, I would argue, be adopted in Canada.
The John Fairfax Pty. Ltd. position can be supported in part through an examination of certain sections of the Canadian Act. The provisions dealing with "infringing copies" and those dealing with "publication" vary in two key respects: first, copy for the purposes of an infringing copy alone, through s.2(j), includes "any colourable imitation" of the work and second, s.21 deems infringing copies "of any substantial part" of a work to be the property of the owner of the copyright in the work. It thus appears that at least for the purposes of infringing copies something beyond a reproduction of the work _literatim et verbatim_ in the same form is contemplated. In defining publication the statute simply speaks in terms of copies of the work and while an inference may arise from the fact that Parliament has expressly excluded publication by certain derivative works, it is submitted that the inference is equivocal at best.

It is open to a Canadian court, therefore, in the context of the present statutory scheme, to hold that the issue of copies of an original derivative work does not publish the underlying work. Adoption of this view would not run afoul of Canadian obligations under the Berne Convention. Article 4(4) provides that "published works" for the purposes of the Convention means, "works copies of which have been issued to the public," with the word "copies" there, as under the Canadian Act, undefined.

More importantly, there seems good reason to take this approach. Publication of a work can operate to determine, at least in the ways discussed above, whether there is copyright in the work at all or if
copyright, how long that copyright is to continue. Such matters, so basic to the creator's legal rights in his creation demand an approach which is directly linked to the creation in its original form. A derivative work itself is an original work so that the issuing of copies of the derivative work to the public should publish the derivative work, but not, the underlying work. Rare would be the case where the owner of the underlying copyright would benefit through publication of his work via the derivative work, and it is easy to conceive of cases where such a rule would work a serious injustice. Publication of a work, therefore, should be expressly defined to exclude the issue of copies of original derivative works based on the work. 147
Conclusion

This paper has proceeded on the premise that there must be copyright law in order to protect the creators of intellectual works. But even more has been assumed. The present Canadian Act provides a satisfactory solution to the task of adequately protecting the interests of creators. The second proposition may seem more controversial than the first, but the reader should not take this to mean that there is not a desperate need for reform of Canadian copyright law. Indeed, over a quarter of a century ago Mr. Samuel Rogers, Q.C. wrote that "there is one point upon which all copyright lawyers are agreed and that is that we need a new Copyright Act." Today the sentiment expressed in Mr. Rogers' words would find overwhelming support from a much wider constituency than the copyright bar. But the demand for reform is more a function of mechanical and external factors than any theoretical unsoundness. The Canadian Act is flawed with numerous drafting difficulties many of which have been cited in this article. This statute is also out of date. In few areas of the law has modern technology made the existing legislation so inadequate. The process of reform has proceeded painfully slowly.

But the essential premise embodied in the Canadian Act remains - the author of an original work is to have the exclusive right to reproduce and exploit his work. This article has accepted that starting proposition and then tackled the subject of derivative works within the present statutory framework. And as in the Canadian Act no attempt has been made to distinguish, as falling into separate categories, traditional or primary works on the one hand and technological or secondary works, on the other. Rather all derivative works have generally been treated alike. But while all derivative works have been approached in a similar fashion such works by their peculiar nature raise many problems unique to themselves. Once it is accepted that a derivative work is
worthy of copyright protection then the problem is not so much one of balancing the rights of the creator with the interests of the public but rather balancing the rights of the underlying author with the rights of the derivative author. This article has surveyed a variety of specific issues and explored how the law has, and often, should reconcile those competing interests. Following is a summary of the article's conclusions.

A derivative work will be protected under the Canadian Act when the author of the work has contributed sufficient time, effort and skill to produce an original work. For some types of derivative works it will simply be a question of degree whether enough has been done to give rise to an original work while with other derivative works the very act of transferring the medium of the original work to the derivative work will satisfy the originality requirement.

The production and subsequent reproduction of an original derivative work without the consent of the owner of the copyright in the underlying work may infringe the copyright in the underlying work. That act of infringement will entitle the underlying copyright owner to a variety of forms of civil relief.

But the fact that a derivative work is produced in infringement of the copyright in the underlying work does not impair the copyright status of the derivative work. The one possible exception may be in the case of mechanical contrivances produced without the consent of the owner of the copyright in the musical work recorded, but even this situation is not entirely free from doubt.

If the consent to produce a derivative work is subsequently withdrawn after an original derivative work has come into existence, further reproduction of the
derivative work by the derivative author may infringe the underlying copyright unless there is a finding of some implied licence in favour of the derivative author. It is unclear whether each copy of the derivative work produced in infringement of the underlying copyright will be an "infringing copy" of the underlying work and thus be deemed the property of the underlying copyright owner. It is recommended that the new statute specifically define infringing copy in a manner which generally will exclude original derivative works based on the underlying work. It should also be made clear that phonograph records and tapes can be infringing copies of musical works.

If a third party reproduces an original derivative work without the derivative copyright owner's consent, the derivative owner can maintain an infringement action. If the consent of the underlying copyright owner has not been obtained then that act of reproduction may also infringe the underlying copyright as well. In other words, a single act can constitute more than one act of infringement and both copyright owners are entitled independently to claim damages or other civil relief.

Meanwhile if the underlying copyright owner makes a copy of another's derivative work based on his work, without the derivative author's consent, the legal consequences are not clear. In such a case the underlying author should not be able to use the derivative author's work without paying for that use.

Finally, the Canadian law remains unsettled as to whether the issue of copies of a derivative work serves to publish the underlying work. The text supra suggests that it should not and it is hoped that a new statute will alleviate this uncertainty.
FOOTNOTES


2. 5

3. R.S.C. 1970, c. C-30, often referred to as the Copyright Act, 1921, hereinafter cited as the Canadian Act.


5. Copyright Act to be revised, The Globe & Mail, (July 17, 1981). Andre Ouellet, Minister of Consumer and Corporate Affairs, and Francis Fox, Communications Minister, have instructed their departmental officials to prepare legislative proposals to revise Canada's copyright act within the next 12 months.

6. The International Copyright Union was established by the Berne Convention for the Protection of Literary and Artistic Works (1886). Great Britain, and thereby Canada, adhered to the Berne Convention of 1886. The Berne Convention was revised at Paris in 1896 and Berlin in 1908. The Great Britain Copyright Act, 1911, 1-2 Geo. V., c. 46, upon which the Canadian Act [described by Dr. Fox "as a topsy-turvy imitation of the Imperial Act", H. Fox, "Some Points of Interest in the Law of Copyright", (1945-6) 6 U.T.L.J. 100 at 138] is modelled, was enacted to conform to the Berlin Convention of 1908. The Berne Convention was further revised at Rome in 1928. Canada adhered to the Rome Revision and as a result the Canadian Act was amended to accord with that Convention by The Copyright Amendment Act, 1931 (Can.), c. 8. Canada has not adhered to the substantive provisions of any further revisions of the Berne Convention (Brussels (1948), Stockholm (1967) and Paris (1971). One of the matters to be considered in discussing copyright reform is Canada's future adherence to International conventions. For the purposes of this paper however it is assumed that Canada will remain a signatory to the Rome Revision and will not sign any of the later revisions of the Berne Convention.

7. Louvigny de Montigny v. Cousineau, [1950] S.C.R. 297 at 310-311, 10 Fox Pat. C. 161 at 172. Resort may be had to the Convention in order to resolve an ambiguity in the construction of the Copyright Act, 1921. For example, see Ludlow Music Inc. v. Canint Music Corp. Ltd. (1967), 51 C.P.R. 278 at 286-7 (Ex. Ct.).

8. "Members of the Union are obligated to protect the works enumerated in the second paragraph of Article 2 the same as the 'literary and artistic works' enumerated in the first
paragraph. This is explicitly stipulated in the third paragraph which contains the pledge of all countries of the Union to secure protection for the works mentioned above." Ladas, The International Protection of Literary and Artistic Property (1938) p. 242.


10. 4 & 5 Eliz. 2 c. 74. The United Kingdom Copyright Act, 1956 repealed the United Kingdom Copyright Act, 1911. The Canadian Act, on the other hand, remains substantially as it was when first enacted and thus strikingly similar to the Copyright Act, 1911.


16. See s. 6 Canadian Act. The term "author" is generally undefined in the Canadian Act. In the context of derivative works, it is submitted that the author is that person whose original contribution to the derivative work meets the statutory criterion of originality.


19. Ibid. at p. 16.


21. Canadian Act, s. 2(b); Cf. s. 2(r). The person who was the owner of the negative at the time the negative was made is deemed, by s. 9, to be the "author" of the photograph. Cf. note 16.

22. "All photographs are copies of some object such as a painting or a statue". Graves' Case (1869), L.R. 4 Q.B. 715, per Blackburn, J. at 723.

23. Canadian Act, s. 2(b). Cf. s. 2(h).


25. Canadian Act, s. 4(3). The person who was the owner of the original plate from which the mechanical contrivance was derived is deemed, pursuant to s. 10, to be the "author" of the contrivance. Cf. note 16. Subsection 4 was added to s. 4 in 1971 by Bill S-9, An Act to Amend the Canadian Copyright Act, R.S.C. 1970, C. 4 (2nd Supp.) s. 1, in order to delete the performing right in sound recordings. Section 4(4) now makes it clear that copyright in respect of mechanical contrivances is limited to the sole right to reproduce the contrivance. See generally J.R. Alleyn, "The Phonographic Industry Deprived of Its Performing Right in Canada" (1972), 6 C.P.R. (2d) 258 and J. Keon, A Performing Right for Sound Recordings: An Analysis (Copyright Revision Studies, 1980).


27. Ibid. at 361 (S.C.R.) A contrary view of the equivalent provision in the Copyright Act, 1911, 3. 19(1) is to be found in Gramophone Co. Ltd. v. Stephen Carwardine and Co., [1934] Ch. 450. "[T]he copyright conferred by s. 19 is not confined to cases where there subsists a copyright in the original work at the time when the record was made, and I do not think there is anything in the rest of the section which would lead to that restricted view." per Maugham, J. at 457. Also, see Fox, supra note 4 at 190: "A work that is in the public domain may become the subject of this special copyright."

28. Canadian Act, s. 2(g). See Roy Export Co. Establishment v. Gauthier (1973), 10 C.P.R. (2d) 11 (Fed. Ct.) where a cinematographic film was protected as a dramatic work. See also Warner Bros. - Seven Arts Inc. and Warner Bros. - Seven Arts Ltd. v. CESM-TV Ltd. (1971), 65 C.P.R. 215 (Ex. Ct.)
29. Canadian Admiral Corporation v. Rediffusion Inc., [1954] Ex C.R. 382 at 401. This was the position under the Copyright Act, 1911, where dramatic work was defined as it presently is in the Canadian statute. (See Nordisk Film Co. Ltd. v. Onda, [1922] Macq. Cop. Cas. 337). Unfortunately the Canadian Act, as amended, S.C. 1931 c. 8, contains a provision not found in the Copyright Act, 1911, which confuses the issue. Section 3(1)(e) provides that copyright includes the right "in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt, and publicly present such work by cinematograph, if the author has given such work an original character; but if such original character is absent the cinematographic production shall be protected as a photograph." (emphasis added). While the "original character" test contained in the definition of dramatic work relates to the particular cinematographic production, the phrase in s. 3 (1)(e) appears to relate to the underlying work. The problem is that the concluding clause has no place in s. 3(1)(e) at all and should have been included instead in the definition of dramatic work. If this were done, the ambiguity would be resolved and the law clearly as stated in the text above. For a discussion of this problem see Perry, "Copyright in Motion Pictures and Other Mechanical Contrivances," (1972), 5 C.P.R. (2d) 256 at 278-283. Also cf. Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd., [1981] R.P.C. 280 (C.A.)


31. Report of the Committee to Consider the Law on Copyright and Designs, March 1977, Cmd 6732 (hereinafter referred to as the "Whitford Report" - to acknowledge the chairmanship of the Honourable Mr. Justice Whitford) at para. 872-874.


34. Copyright Act, 1956, s. 2(5), (6).


37. Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., [1964] 1 W.L.R. 273 (H.L.); Ravenscroft v. Hebert & Anor, [1980] R.P.C. 193 (Ch. D.). Note that a similar inquiry will be had in cases where the Canadian Act expressly grants the owner of the copyright in the underlying work the right to produce a derivative work. That is, for example, in the case of a dramatization of a novel, not every dramatization produced without consent will infringe the underlying copyright. It will be a matter of degree, the court looking to the substantial similarity between the derivative work and the underlying work.

38. Note that the Rome Revision of the Berne Convention did not contain a general provision explicitly prohibiting the reproduction of works protected by copyright. It was not until the Stockholm Revision (1967) that Article 9, stipulating that authors of literary or artistic works shall have the exclusive right of authorizing reproduction in any manner or form, was introduced. Nevertheless it seems clear that the term "unlawful reproduction" in Article 12 of the Rome Revision of the Berne Convention contemplates an infringing reproduction, that is, a reproduction without consent. An explanation for the approach taken in Article 12 of deeming certain derivative works unlawful reproductions rather than following the approach in the Canadian Act of granting the underlying copyright owner the exclusive right to produce the derivative work is offered in Briggs, The Law of International Copyright (1906) at 389-390: "The fact, however, that at first sight the works in question present the appearance of new and original works gives them at least a prima facie independence, and because of this prima facie independence they are more effectively prohibited by an express designation of them as infringements than by an express extension of the rights in the original work, involving merely by implication that they are to be treated as illegal."

39. Indeed, query whether the subsections of s. 3(1) grant the copyright owner any additional rights or simply illustrate the reach of the substantial reproduction right. Note that the term "substantial part" of the work contained in the introductory paragraph to s. 3(1) is not duplicated later in the subsections of s. 3(1) which enumerate the specific rights of the copyright owner. This expression however is to be implied in all of the provisions granting rights in relation to the work. See Corelli v. Gray (1913), 30 T. L. R. 116 (C.A.).
40. Keyes and Brunet, supra note 30, recommend at pp. 51-53 that, in order to ensure "clarity and certainty", an exclusive right "to adapt" be granted in the new copyright statute. Note that an author also has, independent of his copyright in his work, the right "to restrain any distortion, mutilation or other modification of [his] work which would be prejudicial to his honour or reputation" per s. 12(7). It is conceivable that the author of an underlying work may rely on s. 12(7) to restrain the commercial exploitation of a derivative work. On the issue of moral rights and copyright see, Colas, "Le Droit Moral de L'Artiste sur son Oeuvre," (1981), 59 C.B.R. 521. Cf. s. 26(2).

41. [1936] 3 All E.R. 221 (Ch. D.) It is implicit in the Canadian Act that a two-dimensional reproduction can infringe the copyright in a three dimensional work since s. 17(2), the general exemption section, provides at subsection (b) that in certain circumstances the making of drawings or photographs of a work of sculpture or architectural work of art "do not constitute an act of infringement of copyright". [Note that a plan was protected as a "literary work" under the Copyright Act, 1911, s. 35(1). It still is under the Canadian Act, s. 2(n). The Copyright Act, 1956, provides, however, that a plan, which falls within the definition of a drawing, is to be protected as an "artistic work". See s. 48(1) and 3(1)(a).]

42. Keyes and Brunet, supra note 30, at 49-50. See Copyright Act, 1956, s. 48(1).

43. Richardson, J.B., The Law of Copyright (1913) at 182.

44. For a similar view see Robertson, G.S., The Law of Copyright (1912). [For example, no copyright in an unauthorized translation (p. 14), no copyright in an unauthorized photograph of an artistic work (p. 25)]. However there are still those who today support this view. For example, "[I]f an arrangement is sufficiently original it becomes a work entitled to its own copyright, and at that point the owner of the copyright in the original work has no further control over it." G. McFarlane, "Originality: A Question of Arrangement" (1980), 130 N.L.J. 33 at 34.


46. Ibid. at 70-71. McNair, J. applied the test as formulated by Younger, J. in Glyn v. Weston Feature Film Co., [1916] 1 Ch. 261, 32 T.L.R. 235: "no infringement of the plaintiffs' rights take place where a defendant has bestowed such mental labour upon what he has taken and subjected it to such revision and alteration as to produce an original result." (at 268). Jackett, P. suggests, in obiter dicta, in Ludlow Music Inc. v. Canint Music Corp. (1967), 51 C.P.R. 278 at 297 (Ex. Ct.), a case concerning a song with parodied lyrics, that if the issue of copyright infringement had arisen, he would have applied the Joy Music Inc. test of infringement. It appears however that this test for copyright infringement has only been applied in the case of burlesques or parodies. One explanation for this theoretically inconsistent approach to infringement in such cases is that
"the courts, in many jurisdictions have been unwilling to suppress this independent art form which is sometimes superior to, and more lasting than the original work. They would rather find that parody and satire are deserving of substantial freedom, both as entertainment and as a form of social and literary criticism". G. Dworkin, "The Moral Right and English Copyright Law" (1981), 12 I.I.C. 476 at 484.

47. See, for example, National Film Board v. Bier (1970), 63 C.P.R. 164 (Ex. Ct.) at 171 where Walsh, J. admonishes counsel for his persistent attempts to invert the issue before the court, i.e., arguing that the respondent could obtain copyright in his own publication based on a number of original contributions, when the issue was whether the respondent's publication infringed the copyright in the petitioner's publication.

48. It has been suggested that "[i]t would be desirable that the words and without presenting the character of a new, original work be omitted from Article 12", Ladas, The International Protection of Literary and Artistic Property (Vol. 1, 1938) at 568. Cf. Article 12 of the Paris Revision of the Berne Convention, 1971: "Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

49. See generally Skone James, Mumbery, Rayner James, Copinger and Skone James on Copyright (12th ed. 1980) at 566-572, 705-707 (hereinafter cited as "Copinger and Skone James on Copyright (12th ed.)").

50. Fox does not even raise the issue. Copinger and Skone James on Copyright (12th ed.) discuss the problem in the United Kingdom and state "[u]ntil recently the authorities have not been clear and, even now, the position is not entirely settled." (p. 55). The treatise was published prior to the decision in the case cited in the following footnote. In contrast, it appears that in the United States the matter is quite certain. A derivative work can only be copyrighted with the consent of the publisher of the underlying work. This was the position under the United States Copyright Act of 1909, ch. 320, 35 Stat. 1075, s. 7. See, for example, Wainwright & Co. v. Wall Street Transcript Corporation, 418 F. Supp. 620 (U.S. Dis. Ct., 1976). The Copyright Act of 1976 similarly provides, at s. 103(a), that derivative works are only protected where the use of pre-existing material is made lawfully.

51. Unreported, July 31, 1980 (Q.B.D.)

52. Supra note 27.

53. Supra note 26.

54. Supra note 4 at 192. Fox also cites Wellington Cinema v. Performing Right Society, I.L.R. [1937] Bomb. 724, for the
proposition that a talking motion picture will only be protected as a mechanical contrivance if it was lawfully produced.

55. As to the weight to be given to obiter dictum of the Supreme Court of Canada see Sellars v. The Queen, [1980] 1 S.C.R. 527.

56. Supra note 26 at 374.

57. Supra note 4 at 192.

58. In order to adequately analyze the problem one would presumably start by determining why the special copyright was first introduced. See Australian Performing Right Association Ltd. v. 3 DB Broadcasting Co. Pty. Ltd., [1929] V.L.R. 107 (S.C.). And generally see Mak, Rights Affecting the Manufacture and Use of Gramophone Records (1952).


60. Supra note 17 at 18. The plaintiff made an alternative argument in the Redwood case to the effect that, even if there was copyright in infringing arrangements, which it submitted there was not, then the owner of such copyright would be the owner of the copyright in the underlying work. This, it was argued, followed as a matter of construction from the United Kingdom Copyright Act, 1956 which grants the "exclusive" right [Cf. "sole" right in the Canadian Act] to make adaptations to the owner of the copyright on the underlying musical work. Goff, J. rejected the argument. Cf. Cornish "The Adapter's Right" [1972] J.B.L. 240.

61. "...all such remedies by way of injunction, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right" per s. 20(1)." For a discussion of the civil remedies available in an infringement action see A.M. Butler, Remedies and Enforcement, Copyright Revision Studies (forthcoming).


63. For example, see Davis v. E.I. Du Pont de Nemours Co., 240 F. Supp. 612 (S.D.N.Y. 1965) [defendants held to have infringed copyright when they obtained permission to use a screenplay in preparing a television script but did not obtain permission of the author of the play upon which the screenplay was based].


65. Supra note 27 at 459.

38 Vic., C. 53, S. 4(3).


For the proposition that copyright is solely a creature of statute see, Comaco Co. Ltd. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357, (1979), 45 C.P.R. (2d) 1 at 13 per Estey, J. [The Canadian Act, "creates rights and obligations upon the terms and in the circumstances set out in the statute"]

Supra note 65.

For a discussion of the distinction between an assignment and a licence see infra text at note 114.

Cf note 61.


Although there must be some act of infringement of copyright in order to produce an infringing copy, persons other than those who infringed copyright may be held liable for conversion pursuant to s. 21. Cf. WEA Records Ltd. v. Benson King Ltd., [1975] 1 W.L.R. 44, [1974] 3 All E.R. 81 (Ch. D.)

The enactment of a provision comparable to s. 21 was held not to exclude the inherent jurisdiction of the court to make an order for delivery up for destruction in copyright cases. Wane & Co. v. Seebom (1888), 39 Ch. 73, 57 LJ. Ch. 689; Hole v. Bradbury, (1879), 12 Ch. D. 886, 48 LJ. Ch. 673.

See also s. 25(3) of the Canadian Act. Section 25(1) makes it an offence to knowingly sell, import or distribute for sale "infringing copies" of a work. Where a defendant is prosecuted under that section, the court before whom the proceedings are taken may order that all infringing copies be destroyed or delivered up to the owner or otherwise dealt with as the court may think fit. See also s. 25(2).

Note however that s. 25, unlike s. 21, deals only with infringing copies of a "work" not with infringing copies of a substantial part of a work.


78. (1969), 70 W.W.R. 241, 9 D.L.R. (3d) 182 (B.C.C.A.) Taggart, J.A. appears, however, to be confusing the two remedies of delivery up and specific delivery. See judgment p. 243. Note that the plaintiff's claim in Netupsky v. Dominion Bridge Co. Ltd. was for specific delivery. It is unclear whether a court would have the same discretion if the plaintiff framed his action in replevin under the Replevin Act, R.S.O. 1980, c. 449. Cf. Bentivogli et al. v. W. P. Carey Securities (1975) (2d) O.R. 447.


80. Infabrics Ltd. v. Jaytex Ltd., supra note 73 at 660. Lord Wilberforce expresses a similar view: "[In] imaginable instances very harsh results might follow" at 653.

81. Ibid. at 661.

82. Note that the definition of infringing includes copies "imported in contravention" of the Act. This provision raises a number of difficult problems beyond the scope of this paper. See Henderson, "Canadian Copyright Law in the Context of American-Canadian Relations," (1977), 35 C.P.R. (2d) 67 at 80 and Sharp, "Import Restrictions in the Canadian Copyright Act" (1975), 17 C.P.R. (2d) 20.

83. Copyright Act, 1956 Section 48(1) provides that "reproduction in the case of a literary, dramatic or musical work includes a reproduction in the form of a record or a cinematographic film, and, in the case of an artistic work, includes a version produced by converting the work into a three-dimensional form, or, if it is in three dimensions, by converting it into a two-dimensional form". Section 18(3) excludes from the definition of "infringing copy" reproductions of a literary, dramatic or musical work in the form of a cinematographic film. The s. 18(3) exclusion has been described by the Government as "anomalous" and it has proposed to delete it. Reform of the Law Relating to Copyright Designs and Performers' Protection (1981) Cmdn 8302, ch. 14, para. 6.

84. (1880), 15 Ch. D. 22 at 33.

85. One definition of "copy" crafted by Bayley J. in West v. Francis (1822), 5 B & Ald. 737 at 743, 106 E.R. 1361 at 1363 (K.B.) and cited with approval by Viscount Maugham in King Features Inc. v. O. & M. Kleeman Ltd., [1941] 2 All E.R. 403 at 406 (H.L.) and later cited by Cameron J. in King Features Syndicates Inc. v. Benjamin H. Lechter, [1950] Ex. C.R. 297 at 305 is as follows: "it is a copy which comes so near to the original as to give every person seeing it the idea created by the original."

86. Newmark v. The National Photograph Company and The Edison Manufacturing Co. (1907), 23 T.L.R. 439 (K.B.), decided under the Copyright Act, 1842, 5 & 6 Vict., c. 45, s. 2, and following Boosey v. Wight, [1900] 1 Ch. 122 (C.A.)


90. Graves' Case, supra, note 22

91. Cf. White-Smith Music Co. v. Appollo Co., 209 U.S. 1 (1908) [To treat perforated rolls for use in a player piano as copies of a musical composition is to give the term "copy", "a strained and artificial meaning". per Mr. Justice Day at p. 17.] Cf. Tandy Corporation v. Personal Micro Computers Inc., 524 F. Supp. 171 (1981) where the dependants raised the argument that "R.O.M." ("Read Only Memory") silicon chips are not "copies" of original computer programs imprinted on the chips.


93. Fox, supra note 4 at 388.

94. No. 20 of 1912.

95. "Musical work" was defined, in part, in s. 19(2)(ii), but solely for the purposes of the compulsory licence provision in s. 19(2). This definition in no way bears on the issue in Albert v. S. Hoffnung & Company Ltd.

96. 2 Edw. 7, C. 15, s. 3.

97. [1909] 1K.B.515, 100 LT. 449.

98. Ibid. at 529.


100. Ibid. at 14. See also obiter dicta of Estey, J. in Compco Co. Ltd. v. Blue Crest Music Inc. (1979), 45 C.P.R. (2d) 1 at 15 (S.C.C.). The record "presser is not creating a 'copy' of the existing copyrighted work as does the printer, but rather the presser creates a new work in which a new and separate copyright resides independent of the copyright in the recorded musical work". Yet contra see R. v. Brooks and D.K.K. Enterprises Ltd. (1976), 29 C.P.R. (2d) 77 (B.C.Co. Ct.).

See also S.D.R.M. v. Trans World Record Corp. (1975) 39 C.P.R. (2d) 66 (Fed. C.A.).

Cf. United Kingdom Copyright Act, 1956, s. 48(1) at note 83.

102. Supra note 100 at 13.

103. Supra text at note 80.

104. Isley Report, supra note 30, p. 85

105. Keyes and Brunet, supra note 30, p. 192.

106. "The provision is anomalous... The damages which may be awarded may be out of all proportion to the injury suffered". Whitford Report, supra note 30, at para 702. For a similar view see, Reform of the Law Relating to Copyright, Designs and Performers' Protection (1981) Cmdn 8302, ch. 14, para. 3. Note however that the Whitford Report also recommended that courts should be given the discretionary power to order delivery up of infringing copies as well as anything made for the purposes of producing infringing copies, unless obliteration is possible. See para. 706. Cf. R. v. Mooney's Bay T.V. & Stereo Ltd. (Unreported, May 11, 1981, Ont. Prov. Ct. - Cr. D. per Hutton, J.). The accused was convicted under s. 25(1)(b) of the Canadian Act for renting video cassettes of motion pictures in which copyright subsists. The court, in addition to imposing a fine, ordered that all video cassettes be erased and returned to the defendant.

107. The test parallels the approach taken by the English Court of Appeal in Dicks v. Brooks (1880), 15 Ch. D. 22, at 35, not on the question of whether there was an "infringing copy" but rather whether a "copy" had been produced and thus an act of "infringement". Paraphrasing that test; "Nobody would ever take the derivative work to be the underlying work and nobody would buy the derivative work instead of the underlying work." Cf. Gambart v. Ball 14 C.B. (N.S.) 306, 143 E.R. 463. See also Glyn v. Weston Feature Film Co., [1916] L.J. Ch. 261 at 268.


109. Keyes and Brunet, supra note 30, p. 41.

110. To the extent that there is separate copyright in the sound recording pursuant to s. 4(3) of the Canadian Act, the sound recording would be a derivative work based on the musical work but it would not be a derivative work vis à vis the musical work.
111. In E.J. MacGillvray, The Copyright Act, 1911, Annotated (1912), the author suggests that the question of whether or not a derivative work can be an infringing copy of the underlying work should be answered by asking whether the derivative work and underlying work fall into "the same class or order." (p. 83-84) So, for example, a translation could be an infringing copy of a literary work and a record would not be an infringing copy of a musical work -- in both cases a different conclusion from that proposed. But what determines whether two works are of the same class or order? For example, why should a dramatized version of a non-dramatic work be treated as falling in the same category?

112. Note that s. 19(1) of the Canadian Act provides that "it shall not be deemed to be an infringement of the copyright in any musical work" to make mechanical contrivances have previously been made with the consent or acquiescence of the owner of the copyright in the musical work and if the prescribed notice and payment of royalties have been made. See Ludlow Music Inc. v. Canuit Music Corp. Ltd. supra note 7 and generally Noel, "Compulsory Licences and Copyright," (1981) Revue Internationale du Droit D'Auteur 51.


114. See, for example, Chappell Music Ltd. et al. v. GRT Canada Ltd. et al. (1979), 45 C.P.R. (2d) 145 (Fed. Ct. T.D.) where the plaintiffs, the owners of the copyright in certain musical works, revoked all licences granted to the defendant upon default by the defendant, and claimed all records and tapes manufactured thereafter as "infringing copies". An application to settle the formal order was made. See Chappell Music Ltd. v. GRT Canada Ltd. (1980), 53 C.P.R. (2d) 196 (Fed. Ct. T.D.). As to whether tapes and records are "infringing copies" of musical works, see supra text at note 92 ff.


116. Clearly, if an assignment operates to revoke prior licences, it only does so to the extent that the assignment relates to the doing of acts specified in the licences. The Isley Report, supra at note 30, recommended that a provision be included in the Canadian statute to the effect that a licence should be binding upon every successor in title to the owner of copyright, even a bona fide purchaser for value without notice. See p. 115 Cf. Copyright Act, 1956, s. 36. For some insight on the problem at common law see Tito v. Waddell (No.2); Tito v. Att.-Gen., [1977] 3 All E.R. 129. Applying Megarry V.-C's "benefit and burden principle" it would seem that an assignee would be obliged to respect prior licences.


119. Supra text at note 92 ff.

120. [1914] IKB 395, 83 L.J.K.B. 1234 (C.A.). There were other statutory provisions considered by the court which could justify the result in the case. See Copinger and Skone James, Copyright (5th ed.) (1915) at 274.

121. See Isley Report, supra note 30 at p. 51, for a similar recommendation.

122. There are other faults with the present wording of S. 17(4) which have been remedied by s. 5(2). Note the inopposite use of term "work" in s. 17(4). Generally, the Canadian Act uses the term "work" to refer to something in which there may be copyright such as a musical work or artistic work. This however is not the meaning given to the term in S. 17(4). Compare the word "articles" in s. 5(2).

123. There is a possible exception. If the underlying work was previously unpublished, a possible infringement action could result from the sale of lawfully produced copies of a derivative work. Section 3(1) grants the sole right "if the work is unpublished, to publish the work or any substantial part thereof". So if the underlying work is "unpublished" and the derivative work is "a substantial part thereof", the issue of copies of the derivative work to the public will infringe the underlying copyright. Section 3(1)(a) gives the sole right to publish any translation of the work to the owner of the copyright in the work. Although s. 3(1)(a) does not restrict the right to the case of the first publication, it is suggested that s. 3(1)(a) is to be read in light of the opening paragraph of s. 3(1), and therefore understood to mean first publication. This issue is explored in greater detail in the following section of the article. Cf. Infabrics Ltd. v. Jaytex Ltd. [1981] 2 W.L.R. 646 (H.L.)


131. Copyright Act of 1976, s. 101.


134. (1979), 45 C.P.R. 1 at 8. Interestingly, Estey J. then went on to consider in some detail a number of American copyright decisions.

Copyright in the United States is a matter of social contract, according to which the state grants a monopoly to authors in order to persuade them to make their workers available. The Constitution of the United States of America, Art. 1, s. 8, cl. 8 provides that:

"the congress shall have power ... to promote the progress of a science and useful arts, bysecuring for limited times to authors ... to exclusive right to their respective writings."

The theoretical underpinning of Canadian copyright law is unclear. Cf. note 69. For a discussion of the theoretical basis of Canadian copyright law see Roberts, "Canadian Copyright National Property or Mere Monopoly"(1979), 40 C.P.R. (2d) 33 and

135. All the ways in which the derivative work can lawfully be utilized will be determined by the terms of the agreement. Apart from the terms of the agreement, however, the author of the underlying work will be able pursuant to s. 12(7) of the Canadian Act, to restrain any distortion, mutilation or other modification of the underlying works which will be prejudicial to the author's honour or reputation.

136. Keyes and Brunet, supra note 30 at p. 76.
137. Both the Rome and the Berlin Revisions of the Berne Convention
are silent on the question of whether publication must be with
consent. It was not until the Revision in Stockholm in 1967
that the Berne Convention expressly adopted the position pre-
rently reflected in 3(3) of the Canadian Act. See Article 3(3)
of the Stockholm Text.


139. Canadian Act, s. 45. No person is entitled to copyright or any
similar right in any literary, dramatic, musical or artistic
work otherwise than under and in accordance with the provisions
of this Act, or of any other statutory enactment for the time being
in force, but nothing in this section should be construed as
abrogating any right or jurisdiction to restrain a breach of
trust or confidence.

140. Canadian Act, s. 4.

141. Canadian Act, s. 6. The term of copyright for some derivative
works such as photographs and mechanical contrivances is a shorter,
fixed term (i.e., fifty years). See supra notes 21 and 25.

142. The United Kingdom, Copyright Act, 1956 provides at s. 49(2)
(a) that the issue of phonographic records cannot publish a musical
work. The issue has also arisen in the United States where
under the Copyright Act of 1909 publication without registration
resulted in a loss of common law copyright. See Rosette v. Rainbo
354 F. Supp. 1183 (S.D. N.Y. 1973) [phonograph record is not a
"copy" of a musical composition through distribution of phonograph
records] See J. Garzilli, "Rosette v. Rainbo: Its Impact on
Copyright Law and the Music Industry" (1973), 20 Bulletin:
Copyright Society of the U.S.A., 412

143. Supra text at note 92ff. Although the matter does not appear to
have been decided by a Canadian court, it is submitted that under
the Canadian Act distribution of phonograph records will not
publish the underlying musical work. Thus it is open to the owners
of the copyright in a musical work to indefinitely collect
mechanical royalties. But even if this is correct "it is unlikely
that the owners [of the copyright in a musical work] would fore-
sake the possible profits of the publishing and theatrical fields
for, in effect, perpetual recording rights". S. Rothenberg,
Copyright and Public Performance of Music (1954) at 84.

144. In this sense the Canadian Act is at variance with the Berne
Convention, Article 6, according to which first publication in
a qualified territory is an alternative basis for Convention
copyright protection. Although Fox, at pp. 62-63 supports the
view expressed in the above text, it should be noted the Canadian
Act is ambiguously drafted in this regard. Contrast the Copyright
Act, 1911, s. 1(1). Also see Ludlow Music Inc. v. Canint Music
Corp. (1967), 51 C.P.R. 278 at 286. Keyes and Brunet recommend
that the act be revised to ensure an interpretation which meets
Canada's international commitments supra note 30 at 44.
145. (1960), 60 S.R. (N.S.W.) 413 (In Banco).

146. Compare the position under the Copyright Act, 1956 in relation to phonograph records, Supra note 83. While a phonograph record can be an infringing copy of a musical work, distribution of copies of the record cannot publish the musical work.

147. Indeed, it could be argued that Canada is obligated by the terms of the Berne Convention to adopt this position. Article 2(2) provides that translations, adaptations and other derivative works shall be protected as original works but "without prejudice to the rights of the author of the original work." Thus the question is whether a publication of the original work via the derivative work can be said to "prejudice the rights of the author of the original work in his original work." But even if it were accepted that it did there is a further problem. Since any resulting prejudice to the owner of the copyright in the original work is not causatively linked to the copyright "protection" of the derivative work, article 2(2) is unlikely to be viewed as addressing the issue of publication. Cf. Section 7 of the Copyright Act of 1909:

"Compilations or abridgments, adaptations, arrangements, dramatizations, translations or other versions of works ... shall be regarded as new works subject to copyright ... but the publication of any such new work shall not affect the force or validity of any subsisting copyright ... (emphasis added)

148. (1954), 19 C.P.R. 73 at 73. This was part of an address presented to the annual meeting of the Patent Institute of Canada held at Toronto, October 1, 1953.

149. Witness the experience in the United States. The revision of the copyright law began formally in 1955 ending with the enactment of the Copyright Act of 1976. Why has the process continued so long in Canada? Graham J. commenting on intellectual property reform in general offers an explanation: "It is a broad subject and much of the law is complicated and difficult to comprehend. Few people and particularly politicians have the inclination to spend the time necessary to understand it because it does not normally confer voting power or attract publicity, both of which are the life-blood of the politician legislator. It is only to be expected therefore, as almost always turns out in practice, that legislation about intellectual property has to take its turn at the end of the queue ...." Graham J., "Industrial Property - The Scene in Europe", [1980] P.T.M. Institute Bull. 247 at 259.