

# LAW 343 - A02: COMPARATIVE COPYRIGHT LAW

*Professor Howell*

## Course Syllabus and Notes: FALL 2010

With some modification in emphasis to meet current contextual requirements, this course is substantially the comparative copyright course of the Faculty of Law's International Intellectual Property Law (IIP) Summer Program (2002-2007). The primary focus is U.S. copyright law presented comparatively with Canadian copyright law. These two common law based jurisdictions are then compared with the key principles of civil law *droit d'auteur* and selected aspects of copyright related law found in E.U. Directives. Concluding reference is then made as to how both systems present concepts that might be useful in developing a structure for cultural property interests of various traditional societies that exist in both common law and civil law systems, whether cultural interests should be either "accommodated" in copyright or *droit d'auteur* or receive protection on a *sui generis* basis that might draw on both copyright systems. In time, so called "Cultural Property" may be a third system in the "copyright spectrum". [In the IIP Summer Program, these aspects were addressed in a separate course.]

**This course does not provide a detailed coverage of Canadian copyright law.** Students who want such coverage should enrol in Law 347 *Intellectual Property*. Indeed, Law 347 is recommended as a pre or co-requisite and this course will link with aspects covered in Law 347. However, this course does provide a comparison of key concepts and themes and students may do this course as a "stand alone" course. Evaluation in the course will be focused exclusively on matters covered in this course. To this extent notes and handouts will be made to explain aspects of Canadian copyright law sufficiently for the comparative purposes that this course envisages.

References in U.S. copyright are to the published course book: Robert A. Gorman and Jane C. Ginsburg, *Copyright, Cases and Materials*, 7<sup>th</sup> ed, Foundation Press/Thomson, West 2006.

A supplemental package concerning the E.U. and civil law *droit d'auteur* will be available.

| United States  | Canada  |
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| <p><b>1. The Concept of Copyright</b></p> <p>(i) <i>Gorman</i> pp. 1-37</p> <ul style="list-style-type: none"> <li>• <i>U.S. Constitution</i>, Article I, Section 8, Clause 8 (p. 12)<br/>“The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”</li> <li>• <i>Burrow-Giles Lithographic Co. v. Sarony</i></li> <li>• <i>Bleistein v. Donaldson Lithographing Co.</i></li> </ul> <p>(ii) <i>Gorman</i> pp. 37-49 – Overview of elements of U.S. copyright</p> <p><b>2. U.S. Copyrightable Subject Matter</b></p> <p>a. S. 102, <i>Copyright Act 1976</i> (<i>Gorman</i>, p. 75)</p> <ul style="list-style-type: none"> <li>• <i>Original works</i></li> <li>• Works of <i>Authorship</i></li> <li>• Fixed (as defined)</li> <li>• “Includes”<br/>[See items (1) to (8)]</li> </ul> <p>b. S. 1101(a) – Performers Rights (<i>Gorman</i> pp. 90-96)</p> <ul style="list-style-type: none"> <li>• [Unauthorized fixation and trafficking in sound recordings and musical videos]</li> </ul> <p>c. General Matters (<i>Gorman</i>, pp. 75-96)</p> <p>d. The “Idea/Expression Dichotomy” (<i>Gorman</i>, pp. 96-111)</p> <ul style="list-style-type: none"> <li>• <i>Baker v. Selden</i></li> <li>• <i>Morrissey v. Proctor &amp; Gamble Co.</i></li> </ul> <p>e. Facts &amp; Complications (<i>Gorman</i>, pp. 111-163)</p> <ul style="list-style-type: none"> <li>• S. 101</li> <li>• S. 103</li> <li>• <i>Feist Publications, Inc.</i></li> </ul> | <p><b>1. The Concept of Copyright</b></p> <ul style="list-style-type: none"> <li>• <i>Constitution Act 1867</i>, s. 91(23)</li> <li>• <i>Théberge v. Galerie d’Art du Petit Champlain Inc.</i> (2002), 17 CPR (4<sup>th</sup>) 161 (SCC)</li> <li>• See <i>Howell</i> pp. 1-4 (paras. 1-9)</li> </ul> <p><b>2. Canadian Copyrightable Subject Matter</b></p> <p>a. <i>Copyright Act</i>, RSC 1985, c. I9, s. 5 (works)<br/>“every original literary, dramatic, musical and artistic work”</p> <p>b. <i>Copyright Act</i>, ss. 15 and 26; 18 and 21 – “other subject matter” (“Neighbouring Rights”):</p> <ul style="list-style-type: none"> <li>• Performer’s Performances</li> <li>• Sound Recordings</li> <li>• Broadcaster’s communication signals</li> </ul> <p>c. “Originality” – see <i>CCH Canada Ltd. v. Law Society of Upper Canada</i> (2004) 2004 SCC 13. See <i>Howell</i> pp. 8-10 (paras. 17-21)</p> <p>d. Copyrightability – <i>Howell</i>, pp. 10-11 (paras. 22-27)</p> <p>e. Facts and Compilations</p> <ul style="list-style-type: none"> <li>• s. 2 – definition – “compilation”</li> <li>• Originality</li> <li>• See <i>Howell, ibid.</i></li> </ul> |

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| <ul style="list-style-type: none"> <li>• <i>Nash v. CBS</i></li> </ul> <p>f. Derivative Works (pp. 164-180)</p> <ul style="list-style-type: none"> <li>• <i>Batlin &amp; Son v. Snyder</i></li> <li>• Originality in derivative works</li> </ul> <p>g. Computer Programs (pp 181-206)</p> <ul style="list-style-type: none"> <li>• <i>Apple Computer, Inc. v. Franklin Computer Corp</i></li> <li>• <i>Lotus Development Corp v. Borland International, Inc</i></li> <li>• <i>Cf Infringement/Copyrightability: Computer Associates International, Inc. v. Altai, Inc.</i> (p. 559)</li> </ul> <p>h. Pictorial, Graphic and Sculptural Works (pp. 206-252)</p> <ul style="list-style-type: none"> <li>• <i>Mannion v. Coors Brewing Company</i></li> <li>• Note re Applied Art <ul style="list-style-type: none"> <li>○ Rule in <i>Mazer v. Stein</i>, 347 U.S. 201 (1954)</li> <li>○ S. 113 – “works of Applied Art”</li> <li>○ What is a “useful article”</li> <li>○ <i>Pivot Point International, Inc. v. Charlene Prods. Inc.</i></li> </ul> </li> </ul> <p>i. Characters (pp. 259-268)</p> <ul style="list-style-type: none"> <li>• <i>Anderson v. Stallone</i></li> <li>• <i>Gaiman v. McFarlane</i></li> </ul> <p>j. Sound Recordings (pp. 268-273)</p> <ul style="list-style-type: none"> <li>• <i>Newton v. Diamond</i></li> </ul> <p><b>3. Formalities (Gorman pp. 464-501)</b></p> <ul style="list-style-type: none"> <li>• Background reading</li> <li>• Estate of <i>Martin Luther King, Jr., Inc. v. CBS, Inc.</i> (re publication)</li> <li>• <i>Academy of Motion Picture Arts &amp; Sciences v. Creative House Promotions, Inc.</i> (re publication)</li> </ul> <p><b>4. Exclusive Rights Under Copyright (Gorman, p. 502)</b></p> <p>a) S. 106, <i>Copyright Act 1976</i></p> <p>b) Reproduction</p> <ul style="list-style-type: none"> <li>• S. 106(1)</li> <li>• Notes pp. 502-508</li> </ul> | <p>f. No general category or concept of “Derivative Works”</p> <ul style="list-style-type: none"> <li>• s. 3(1)(a)-(e)</li> </ul> <p>g. Computer Programs</p> <ul style="list-style-type: none"> <li>• s. 2 – Definition</li> <li>• Literal copying</li> <li>• Non-literal copying</li> <li>• <i>Apple Computer Inc. v. Mackintosh Computers Ltd.</i> [1990] 2 SCR 209</li> </ul> <p>h. “Artistic Work” and subcategories</p> <ul style="list-style-type: none"> <li>• 2D/3D</li> <li>• 3D/3D</li> <li>• ss. 64/64.1</li> <li>• <i>Industrial Design Act</i>, RSC 1985, c. I9</li> </ul> <p>i. Characters:</p> <ul style="list-style-type: none"> <li>• Literary</li> <li>• Artistic</li> <li>• <i>Preston v. 20<sup>th</sup> Century Fox Canada</i> (1990), 33 C.P.R. (3d) 242, 275-77 (FCTD)</li> <li>• <i>Anne of Green Gables Licensing Authority v. Avonlea Traditions Inc.</i> (2000), 4 CPR (4<sup>th</sup>) 289 (Ont. S.C.)</li> </ul> <p><b>3. No Mandatory Formalities</b></p> <p><b>4. Exclusive Rights</b></p> <p>a) s. 3 Copyright Act</p> <ul style="list-style-type: none"> <li>• “Reproduce – “any material form”</li> <li>• If unpublished – to publish</li> </ul> |

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| <ul style="list-style-type: none"> <li>• Copying – <i>Arnstein v. Porter</i> and following materials, pp. 509-523</li> <li>• Infringing copying <ul style="list-style-type: none"> <li>○ Introduction (pp. 524-536)</li> <li>○ <i>Herbert Rosenthal Jewelry Corp. v. Kalpakian</i> (pp. 529-533)</li> <li>○ <i>Approaches to “substantial similarity”</i> (pp. 554-559)</li> <li>○ <i>Steinberg v. Columbia Pictures Industries</i> – pp. 572 – 578)</li> </ul> </li> <li>c) See generally Sound Recording Rights, pp. 589-603</li> <li>d) Right to Prepare Derivative Works (pp. 603 - ) <ul style="list-style-type: none"> <li>• S. 106(2); s. 101 (definition)</li> <li>• <i>Horgan v. Macmillan, Inc.</i> (pp. 605 – 608)</li> <li>• <i>Lee v. A.R.T. Co</i> (pp. 610-612)</li> <li>• <i>National Geographic v. Classified Geographic, Inc.</i> (pp. 613-614)</li> <li>• <i>Micro Star v. Formgen Inc</i> (pp. 614-618)</li> <li>• <i>Moral Rights</i> [see later]</li> </ul> </li> <li>e) Right to Distribute <ul style="list-style-type: none"> <li>• S. 106(3) (p. 502)</li> <li>• S. 101 – “Publication” – Definition (1976) (p. 478)</li> <li>• S. 109(a) (p. 647)</li> <li>• Notes pp. 647 – 651</li> <li>• First Sale/Exhaustion (pp. 651-655)</li> <li>• Importation (pp. 657-664)</li> </ul> </li> <li>f) Rights of Public Performance and Display (N.B. Emphasis here will be on the “Display” aspects) <ul style="list-style-type: none"> <li>• S. 106(4) &amp; (5)</li> <li>• Display – 106(5) (pp. 681 – 686) <ul style="list-style-type: none"> <li>– 101 – Definition of “display”</li> </ul> </li> <li>• S. 109(c) &amp; (d) (first sale doctrine)</li> <li>• Note – p. 683 – copy from which image is derived must be in the presence of the viewers</li> <li>• Digital Performance Right in Sound Recordings (pp. 686-693)</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• Perform the work in public</li> <li>• s. 3(1)(f) – communicate the work “to the public”</li> <li>• s. 3(1)(g) – Exhibition Right</li> <li>• Enumerated Rights</li> <li>• Authorization Right</li> <li>b) ss. 15 and 26, 18 and 21 re “other subject matter”</li> <li>c) Substantiality</li> </ul> |

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| <p><b>5. Fair Use (p. 715 et seq.)</b></p> <ul style="list-style-type: none"> <li>• S. 107 and notes (pp. 715-717)</li> <li>• <i>Campbell v. Acuff-Rose Music, Inc.</i> (pp. 717-730)</li> <li>• Notes pp. 730-735</li> <li>• <i>Suntrust Bank v. Houghton Mifflin Co.</i> (pp. 736-737)</li> <li>• Notes re <i>Walt Disney Prods v. Air Pirates</i> and <i>Mattel, Inc. v. Walking Mountain Productions</i> (pp. 738-746)</li> <li>• <i>Harper &amp; Row Publishers, Inc. v. Nation Enterprises</i> (pp. 746-759)</li> <li>• <i>Princeton University Press v. Michigan Document Services, Inc.</i> (pp. 787-802)</li> <li>• <i>UMG Recordings, Inc. v. MP3.com, Inc.</i> (pp. 812-815)</li> <li>• <i>Kelly v. Arriba Soft Corporation</i> (pp. 815-821)</li> <li>• <i>Perfect 10 v. Google, Inc.</i>, (pp. 821-823)</li> <li>• <i>A &amp; M Records, Inc. v. Napster, Inc.</i> (pp. 834-843)</li> <li>• <i>BMG Music v. Gonzalez</i> (pp. 843-847)</li> </ul> <p><b>6. Audio Home Recording Act of 1992, P.L. 102-563</b></p> <ul style="list-style-type: none"> <li>- added chapter 10 to the <i>Copyright Act of 1976</i>, USC Title 17 – “Digital Audio Recording Devices and Media”</li> </ul> <p><b>7. Secondary [Indirect] Liability</b> (pp. 848-907)</p> <ul style="list-style-type: none"> <li>• <i>Authorization Right</i>, s. 106 (p. 502 and Note at pp. 503-504)</li> </ul> | <p><b>5. Fair Dealing</b></p> <ul style="list-style-type: none"> <li>• Purposes</li> <li>• Fair amount <ul style="list-style-type: none"> <li>– s. 29 Research/Private Study</li> <li>– s. 29.1 Criticism/Review</li> <li>– s. 29.2 News reporting</li> </ul> </li> <li>• <i>CCH</i> (SCC – 2004)</li> <li>• See Howell, pp. 11-15 (paras. 38-44)</li> </ul> <p><b>6. “Blank Tape Levy”</b></p> <ul style="list-style-type: none"> <li>• <i>Canadian Private Copying Collective v. Z.E.I. Media Plus Inc.</i>, 2006 FC 1546, [2006] F.C.J. No. 1931</li> <li>• <i>Canadian Private Copying Collective v. Canadian Storage Media Alliance</i>, 2004 FCA 424, [2005] 2 FCR 654</li> </ul> <p><b>7. Indirect Liability</b></p> <ul style="list-style-type: none"> <li>• <i>Authorization Right</i> <ul style="list-style-type: none"> <li>- s. 3(1) (works)</li> <li>- ss. 15(1) and 26(1) (Performer’s Performances)</li> <li>- s. 18(1) (Sound Recordings)</li> <li>- s. 21(1) and 21(1)(d) (Broadcaster’s Communication Signal)</li> </ul> </li> </ul> |



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| <ul style="list-style-type: none"><li>• Note re <i>Right of Association</i> (pp. 641-643)</li><li>• <i>Wojnarowicz v. American Family Ass'n.</i> (pp. 643-647)</li></ul> |               |

## European Union

1. See extract, S.M. Stewart, *International Copyright and Neighbouring Rights*, 2<sup>nd</sup> ed. (1989) paras. 1-12 to 1-16 comparing the concept and general philosophy of *le droit d'auteur* (civil law systems) and “copyright” (common law systems).
2. Stewart (above) paras. 14-15 to 14-21 concerning “Relationship between ‘droit d'auteur’ and neighbouring rights in historical and philosophical contexts.
3. P.E. Geller, *International Copyright Law and Practice*, vol. 1 (looseleaf - 2009)
  - S.1 [1][c] EU Institutions and Instruments, pp. EC 11-17
  - S.1 [2][a] Application of E.C. Law to Copyright, pp. EC 17-27
  - S.3 [3][a] Copyright and Abuse of Dominant Position – *Volvo; Magill*; and *IMS Health*, pp. 56-60 [C.f. HL copyright decision in *British Leyland Motor Corp. Ltd. v. Armstrong Patents Co. Ltd.* [1986] 1 All ER 850 (HL) in Howell, Vincent and Manson, *ibid.* at pp. 222-225]
4. Geller, *ibid.* – France
  - S. 1 [3] – 2 [4][d] (pp. FRA 12-35) [Economic interests]
  - S. 7 (pp. FRA 89-106) [Moral interests]
5. Two key copyright related rights found in European Union:
  - a. *The European Database Directive* 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases
  - b. *Resale right for the benefit of the author of an original work of art – droit de suite* – Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001Copies of both Directives are on reserve in the library. Of course, they are available electronically ... see [http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/126028\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/126028_en.htm) and <http://eur-lex.europa.eu/lexUriServ.do?uri=CELEX:32001L0084:EN:NOT> .  
With respect to the Database Directive see Howell, “The Current Stalemate Concerning A Database Right: To What Extent Should Canada Contemplate Such A Move?”, 2006 Vancouver Conference, International Intellectual Property Program (Handout)
6. See generally EU Commission – The EU Single Market – Documents: *Publication on the EC Directives on Copyright and Related Rights*:  
[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm) .

### **Cultural Property Comparison**

See Howell and Ripley, "Intellectual Property and Cultural Property ('Traditional Knowledge')" in *Protection of First Nations Cultural Heritage*, ed. Catherine Bell and Robert Paterson, UBC Press, Vancouver (2009) at pp. 223-246 (On Reserve).