

**WORK INCLUDES TITLE:
SOME COMMENTS ON A NEGLECTED COPYRIGHT DEFINITION**

by

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“WORK”

“work” includes the title thereof when such title is original and distinctive;

«ŒUVRE» *

«oeuvre» Est assimilé à une œuvre le titre de l'œuvre lorsque celui-ci est original et distinctif.

R.S.C. 1985, c. C-42, s. 2

§1.0 Related Sections

Section 2—Definitions: “architectural work”, “artistic work”, “choreographic work”, “cinematographic work”, “collective society”, “collective work”, “commercially available”, “compilation”, “copyright”, “dramatic work”, “engraving”, “every original literary, dramatic, musical and artistic work”, “infringing”, “literary work”, “maker”, “musical work”, “perceptual disability”, “performance”, “performer’s performance”, “photograph”, “plate”, “sound recording”, “sculpture”, “work of joint authorship”; section 2.1—Compilations; section 2.2—Definition of “publication”; section 2.3—Telecommunication; section 2.4—Communication to the public by telecommunication; section 3—Definition of “copyright”; section 3—Copyright in works; section 4—Definition of “publication”; section 5—Conditions for subsistence of copyright; section 6—Term of copyright; section 6.1—Anonymous and pseudonymous works; section 6.2—Anonymous and pseudonymous works of joint authorship; section 7—Term of copyright in posthumous works; section 8—Reproduction of works after death of author; section 9—Cases of joint authorship; section 11.1—Cinematographic works; section 12—When copyright belongs to Her Majesty; section 13—Ownership of copyright; section 14—Limitation where author is the first owner of copyright; section 14.1—Moral rights; section 14.2—Term; section 17—Cinematographic works; section 19—Right to remuneration; section 27—Infringement generally; section 28.1—Infringement generally; section 28.2—Nature of right of integrity; section 29.1—Criticism and review; section 29.2—News reporting; section 29.4—Reproduction for instruction; section 29.5—Performances; section 30—Literary collections; section 30.5—Copies for archival purposes; section 30.7—Incidental use; section 31—Interpretation (Retransmission); section 32—Reproduction in alternate format; section 32.1—No infringement; section 32.2—Permitted acts; section 34—Copyright (Civil remedies); section 34.1—Presumptions respecting copyright and ownership; section 38—Recovery of possession of copies, plates; section 39—Injunction only remedy when defendant not aware of copyright; section 40—No injunction in case of a building; section 42—Offences and punishment;

* Note : “Oeuvre”, as the French translation of “work”, was numbered 2(v) from 1931.06.11 to 1953.09.14 and 2w) from 1953.09.15 to 1971.07.14.

section 43—Infringement in case of dramatic, operatic or musical work; section 44—Importation of certain copyright works prohibited; section 44.1—Definitions (Importation); section 45—Exceptions (Importation); section 54—Register of Copyrights; section 55—Copyright in works; section 56—Copyright in subject-matter other than works; section 60—Subsistence of substituted right; section 64—Interpretation (utilitarian designs); section 64.1—Non-infringement re useful article features; section 64.2—Application of Act to topographies; section 67—Public access to repertoires; section 67.1—Filing of proposed tariffs; section 68—Board to consider proposed tariffs and objections; section 68.1—Special and transitional royalty rates; section 70.1—Collective societies; section 70.11—Public information; section 70.2—Application to fix amount of royalty, etc.; section 73—Certification; section 76—Claims by non-members; section 77—Circumstances in which licence may be issued by Board; section 79—Definitions (Private copying); section 80—Where no infringement of copyright; section 81—Right of remuneration; section 83— Filing of proposed tariffs;

§2.0 Related Regulations

None.

§3.0 Legislative History

§3.1 Corresponding Section in Prior Legislation

Section 2 (v) from 1931.06.11 to 1953.09.14; section 2 (u) from 1953.09.15 to 1971.07.14; section 2 from 1971.07.15 to present (Note: “Oeuvre”, as the French translation of “work”, was numbered 2 (v) from 1931.06.11 to 1953.09.14 and 2 (u) from 1953.09.15 to 1971.07.14.)

§3.2 Text of Statutes

§3.2.1 S.C. 1931, c. 8, s.2 (v) (C.I.F. 1931-06-11):

WORK

OEUVRE

(v) 'work' shall include the title thereof when such title is original and distinctive.

v) «oeuvre» comprend le titre de l'œuvre lorsque ce titre est original et distinctif.

§3.2.2 R.S.C. 1952, c. 55, s. 2(u) (1953-08-15)

WORK

(u) "work" includes the title thereof when such title is original and distinctive;

OEUVRE

u) «oeuvre» comprend le titre de l'œuvre lorsque ce titre est original et distinctif;

§3.2.3 R.S.C. 1970, c. C-30, s. 2 (1971-07-15)**WORK**

"work" includes the title thereof when such title is original and distinctive;

OEUVRE

«oeuvre» comprend le titre de l'œuvre lorsque ce titre est original et distinctif;

§3.2.4 R.S.C. 1985, c. C-42, s. 2 (C.I.F. 1988-12-12):**WORK**

"work" includes the title thereof when such title is original and distinctive;

ŒUVRE

«oeuvre» Est assimilé à une œuvre le titre de l'œuvre lorsque celui-ci est original et distinctif.

§4.0 Purpose

This section provides that the title of a work may be a subject of copyright protection when original and distinctive.

§5.0 Commentary

L'oeuvre est le masque mortuaire de la conception. –Walter BENJAMIN

§5.1 History

This section, which remained substantially unchanged since its introduction in 1931, has no counterpart in the United Kingdom *Copyright Act, 1911*.

§5.2 Construction**§5.2.1 "includes"**

The word “includes” is generally used in interpretation clauses to extend the meaning of words or expressions in a statute. When these words or expressions are used, they must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. “It has been established that when the statute employs the word ‘including’ or ‘includes’ rather than ‘means’ the definition does not purport to be complete or exhaustive and there is no exclusion of the natural ordinary meaning of the words”: *Laidlaw v. Metropolitan Toronto (Municipality)*, (1978) 2 S.C.R. 736, Spence J.

Therefore, since introduced by the word “includes”, the definition of “work” should be construed as illustrative or extensive and not as a complete and exhaustive enumeration: CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Montréal, Blais, 1992), at pp. 55-58; DRIEDGER (Elmer A.), *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983), at pp. 18-22; PIGEON (Louis-Philippe), *Drafting and Interpreting Legislation* (Toronto, Carswell, 1988), at pp. 32-35.

§5.2.2 “includes”/“est assimilé”

In the process of the 1985 revision of the *Copyright Act*, the word “comprend” in the French text (as it was used since 1931; see §3.2 *Legislative History, supra*) was replaced, albeit unfortunately, by “est assimilé” which conveys the idea of comparison, similarity in a classification or incorporation within a system (i.e., “assimilation”) rather than one of placing in a class or category (i.e., “inclusion”).

§5.2.3 Retransmission

In its French text, section 31, which deals with the retransmission of local signals, uses its own definition of “work”, namely: ««oeuvre» Oeuvre littéraire, dramatique, musicale ou artistique.»

Such a definition, quite surprisingly, does not cover subsections 3(1.4) and 3(1.5), which deal with some operational modalities of section 28.01. Therefore, for the purpose of section 3, “work” is still defined in section 2.

§5.3 General

Là où d’autres proposent des oeuvres,
Je ne prétends pas autre chose que de montrer mon esprit

—Antonin Artaud, *L'ombilic des limbes* (1925)

The definition provided by section 2 does not really help to make clear the meaning of the word “work”, as the definition only refers to the title.

§5.3.1 Dictionaries

As the term “work” is not otherwise defined in the *Copyright Act*, useful reference could be made to ordinary dictionaries in order to ascertain the true meaning of the word: see *Composers', Authors' & Publishers Assn. (Canada) Ltd. v. CTV Television Network Ltd.*, (1968) S.C.R. 676, Pigeon J. at 681.

The 1984 Third Revision Edition of the *Shorter Oxford English Dictionary*, provides, amongst others, for the following definition:

1. The product of the operation or labour of a person or other agent; creation, handiwork. Also vaguely, the result of one's labour, something accomplished; 5. A literary or musical composition (viewed in relation to its author or composer) (...); 6. A product of any of the fine arts (in relation to the artist), as a painting, a statue, etc.

For its part, the 1983 revision of *Gage Canadian Dictionary* offers the following definition: “something made or done, especially something creative; the result of an effort”.

The 1988 Second Revised Edition of *Le grand Robert de la langue française* defines “œuvre” as, *inter alia*: “Ensemble organisé de signes et de matériaux propres à un art, mis en forme par l'esprit créateur; composition, production littéraire ou artistique”.

§5.3.2 Categorization of works

However, in view of section 5(1) of the *Copyright Act*, in order to qualify for copyright protection, a work must, amongst other things, fall into one or more of the four categories stated at under the definition of “every original ... work” referred to in section 2, namely:

- i) artistic works,
- ii) dramatic works,
- iii) literary works, and
- iv) musical works.

The *Copyright Act* makes also reference to other types of works: hence, "architectural work", "choreographic work", "cinematographic work", "photograph" and "sculpture" are defined but they do not constitute category of their own, being included in one of the four main categories of protectable works; furthermore, if "collective work" and "work of joint authorship" are defined they, also, do not constitute a category of their own but rather qualify as other types of works.

Prior to the coming into force on 1991.09.01 of *An Act to amend the Copyright Act* (S.C. 1997, c. 24), in addition to those four categories of works, then subsection 5(3) of the *Copyright Act* creates, specific protection for "records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced, *in like manner as if those contrivances were musical, literary or dramatic works*" (our underlinings). For the purpose of the *Copyright Act*, those contrivances are to be considered as "work": see *Fly by Nite Music Co. Ltd. v. Record Warehouse Ltd.* (1975), (1975) F.C. 386 (F.C.T.D.) Mahoney J., at pp. 393-394. However "sound recordings", "performer's performances" and "communication signals" are now protected as "subject matters other than works": see section 2 definition of "copyright", sections 15, 18 and 21.

§5.3.3 Fixation and originality

As put by Cameron J. in *Canadian Admiral Corp. v. Rediffusion, Inc.*, (1954) Ex. C.R. 382 (Ex. Ct. at 294): "for copyright to subsist in a 'work' it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance." As a consequence, oral works, unless they are fixed in some material way, will not be protected under the *Copyright Act*: see discussion under section 2 definition of "every original ... work".

The character, quality or the merit of a work is immaterial, but only works that are original (*i.e.*, not copied) will deserve copyright protection. Furthermore, as a general rule, copyright is not concerned with the protection of ideas and schemes but rather with their expression: see section 2 definition of "every original ... work".

" 'Work' as used in the *Copyright Act* means the ordered expression of thought": STERLING (J.A.L.) et al., *Copyright Law in the United Kingdom*, 1st ed. (London, Legal Books, 1986), at no. 214.

§5.4 Titles

Les titres des livres sont souvent d'effrontés imposteurs. — Honoré de BALZAC

(...) nous ne commettons pas l'erreur des romanciers, qui se croient tenus, quand ils ont leur titre, d'écrire en supplément le roman lui-même. — Jean GIRAUDOUX, *La folle de Chaillot*

Le titre est la coiffure de l'œuvre littéraire. L'auteur y attache autant d'importance qu'une femme à son chapeau. Ni l'un ni l'autre n'ont tort: comme le chapeau est le couronnement d'une toilette, le titre est le complément de l'œuvre. Un mot-panache révèle le trait caractéristique de l'œuvre ou de son auteur. — MAYRAND (Albert), *Respect au titre de l'œuvre littéraire* (1957), 17 *Revue du Barreau* 49, at p. 49.

§5.4.1 What is a title?

A title is generally understood as the name of a work, being a book, a poem, a play, a song, a movie, etc.

The 1984 Revised Third Edition of *The Shorter Oxford English Dictionary* provides the following definition:

(1. An inscription placed on or over an object, giving its name or describing it; a legend; 2. The descriptive heading of each section or subdivision of a book (now only in law-books); the formal heading of a legal document; 3. the name of a book, poem, or other (written) composition; an inscription at the beginning of a book, describing or indicating its subject, contents or nature, and usually giving also the name of the author, compiler, or editor, and of the publisher, and the place and date of publication; also = TITLE-PAGE. Also, the designation of a picture or statute.)

The 1981 Revised Third Edition of *Webster's New Collegiate Dictionary* defines "title" as, amongst other things: "5 a: the distinguishing name of a written, printed, or film production b: a similar distinguishing name of a musical composition or a work of art."

The 1993 Revised Edition of *Le Petit Robert*, for its part, gives the following explanation: "IV° (Désignation d'un sujet.) 1. Désignation du sujet traité (dans un livre); nom donné (à une oeuvre littéraire) par son auteur, et qui évoque plus ou moins clairement son contenu. (...) 2. Nom d'un texte, d'une oeuvre. 3. Expression, phrase, généralement en gros caractères, qui présente un article de journal."

In subsection 27(2) (d) of the *Copyright Act*, for instance, the word "title" is to be understood as "the title page" rather than the name of the collection.

Furthermore, for the purpose of subsection 2(25), "title" should not be construed as the legal justification to the possession of property as was the case, for instance, in *Harris v. Canadian Music Sales Corp.* (1941), 1 Fox Pat. C. 128, Middleton J. at 129 (Ont. C.A.).

§5.4.2 Not a work by itself

Does the title of a work constitute a work separate and independent from the work it names?

At first glance, the use of the extensive "includes" in the definition of "work" would lead one to believe that a "title" is one kind of "work", subject to protection of its own as, for instance, books or computer programs.

It is now settled law that, *in general*, a mere title is not, by itself, the proper subject-matter of copyright independent of the work to which it relates: see *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.* (1939), (1940) A.C. 112, Wright J. at 124-125 (P.C.). In fact, "work" is not defined as including "titles" but rather as including "title *thereof*", though making reference to the work itself.

Furthermore, for a title to be protected as part of the work it names, such title would have to be "original and distinctive": see *Flamand v. Société Radio-Canada* (1967), 53 C.P.R. 217, Reid J. at 224 (Que. Sup. Ct.).

It does not mean, however, that copyright protection may not, in proper circumstances, extend to titles by itself: see *CCH Canadian Ltd. v. Butterworths Canada Ltd.*, (1991), (1992) 1 F.C. 3, Cullen J. at 20 (F.C.T.D.). As put by Wright J. in *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.* (1939), (1940) A.C. 112, at 123 (P.C.): "a title may not be on so extensive a scale, and of so important a character, as to be proper subject of protection against being copied". In support of such an assertion, Wright J. made specific reference to *Dick v. Yates* (1881), 18 Ch. D. 76 (C.A.) where Jessel J. stated at 89, that there might be copyright in a title "as, for instance, in a whole page of title or something of that kind requiring invention".

Such an approach favouring quantity over quality has been harshly criticized by MAYRAND (Albert), *Respect au titre de l'oeuvre littéraire* (1957), 27 *Revue du Barreau* 49:

C'est attacher beaucoup d'importance à la quantité et en accorder trop peu à la qualité. Le malheureux auteur qui se fend d'un titre d'une page est précisément celui qui manque d'esprit inventif et d'imagination. Son titre, qui n'excitera pas la convoitise des pirates de la littérature, n'a pas

besoin de la protection de la loi. Qu'il se rassure, personne n'éprouvera la tentation de violer son droit d'auteur.

Utilisant la norme de Sir George Jessel (in *Dicks v. Yates* (1881), 18 Ch. D. 76 (Ch. D.), at p. 89), on devait (in *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corporation* (1939), (1940) A.C. 112 (J.C.P.C.)), trouver trop court le titre *The man who broke the bank at Monte Carlo!* On pourrait plutôt lui reprocher sa longueur et lui préférer *Paris Canaille* (in *Ferré v. Océan Films* (1956), (1956) 2 J.C.P. 9354 (C.A. Paris, 1^{re} chambre – 1956.05.30)) comme composition littéraire. Deux mots et un trait d'union peuvent contenir plus de substance littéraire et évoquer plus d'idées ou d'images que le titre mastodonte d'une page. (at p. 53)

Isoler le titre, c'est décapiter l'œuvre, donc lui faire subir une mutilation majeure. L'importance d'une mutilation ne se mesure pas aux dimensions du membre amputé. Sur ce point, Abélard ne partage pas l'avis de Sir George Jessel. (at p. 55)

Also the interpretation given to the amended definition of work seems to stultify the obvious legislative intention. If a substantial part of a work is taken it seems to matter little whether the title is also taken or not. Whereas taking the title of a work without taking anything else might cause serious damage. The point is however now up to parliament: *Editorial Note* (1939), 9 *Fortnightly Law Journal* 131.

More recently, in *Exxon Corporation v. Exxon Insurance Consultants International Ltd.*, (1981), (1982) R.P.C. 69 (Ch. D.), Graham J. at 79 expressed his doubts as to the unqualified application of a principle the result of which would be that a title, as a matter of law, would never, in any circumstances, be the subject of copyright; see also *Zlata v. Lever Brothers Ltd.*, (1948) C.S. 459, Salvas J. (Que. Sup. Ct.); *contra British Columbia v. Mihaljevic* (1989), 26 C.P.R. (3d) 184, Macdonell J. at 190 (B.C.S.C.).

However, as the law stands, titles, slogans, phrases and advertisement lines are generally considered as unsubstantial works, not attracting *per se* copyright protection. As written by RICKETSON (Stanley), *The Law of Intellectual Property* (Melbourne, Law Book, 1984), at no. 5.61:

Copyright will not usually be held to subsist in works which are "insubstantial". The denial of protection in such cases seems to be based on a *de minimis* rule, although there is also consideration that copyright in a phrase or single word may intrude too much on the rights of the public. An alternative, though perhaps complementary, explanation is that such work lacks originality.

§5.4.3 Categorization of titles

As expressed by STERLING (J.A.L.) et al., *Copyright Law in the United Kingdom*, 1st ed. (London, Legal Books, 1986), no. 747, at p. 534:

In the context of titles of publications, three categories may be distinguished:

1. descriptive titles describing the nature of the book or the subject treated, e.g. *French Cathedrals, Bills of Exchange*,
2. fancy titles containing an element of imagination, e.g. *The Lord of the Rings*,
3. descriptive titles with an element of fancy, e.g. *Life assurance from Proposal to Policy*, where there is “a title element of variation from the strictly necessary description of the contents of the book which gives it the element of fancy” (per Maugham J. in *Mathieson v. Sir Isaac Pitman & Sons Ltd.* (1930) 47 R.P.C. 541, at p. 550).

§5.4.4 Original and distinctive

Qu'un titre sans cachet d'individualité propre, et dont l'emprunt n'est point de nature à faire prendre le change au public et à porter préjudice à l'ouvrage auquel il a été primitivement attribué, ne donne point droit à sa possession exclusive;

-Auguste-Charles RENOUARD, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris, Jules Renouard et Cie, 1839), tome second, p. 128, no. 56.

The definition of “work” provides for the copyright protection of a title, as part of the work it names, inasmuch as such title is: (i) original; and (ii) distinctive. Neither originality nor distinctivity is defined in the *Copyright Act*.

Under the general rule (see discussion under section 2 definition of “every original ... work”), for a title to be *original*, it should suffice that it was not copied from another work: see *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.* (1939), (1940) A.C. 112 (J.C.P.C.—Canada), Wright J. at 124. Surprisingly enough, however, it was repeatedly held that, even though emanating from its author (i.e., not copied from elsewhere), a title that is purely descriptive would not be considered as original: see, amongst others, *Flamand v. Société Radio-Canada* (1967), 53 C.P.R. 217 (Que. Sup. Ct.), Reid J. at 224, and *Rochat v. Société Radio-Canada*, (1974) C.S. 638 (Que. Sup. Ct.), Archambault J. at 7-8 of the full text.

From a review of the case law, it would seem that with respect to titles, the originality required is higher than for other works since something in the like of novelty or inventiveness appears to be requested: as to the requirement of

“inventive originality”, see RICKETSON (Stanley), *The Law of Intellectual Property* (Melbourne, Law Book, 1984), at nos. 5.62-5.63.

As to what constitutes a “*distinctive*” title, Wright J. stated in *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.* (1939), (1940) A.C. 112 (J.C.P.C.—Canada) at 124: “It is, however, difficult to define satisfactorily the word “*distinctive*,” since it cannot mean merely that the title is used to identify the particular work”.

Useful reference could then be made to the *Trade-Marks Act* (R.S.C. 1985, c. T-13, section 2) which defines “*distinctive*” in the following manner: “‘*distinctive*’, in relation to a trade-mark, means a trade-mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them”. For a title to be *distinctive*, it would seem that such a title should not constitute a simple description or summary of the work but should be of such a nature to distinguish one particular work from those of others.

§5.4.5 Effect of copyright registration

Pursuant to paragraph 55(2)(d), an application for copyright registration should indicate the title of the work for which registration is sought. The certificate of copyright is obtained under a title that identifies the work and covers the content of the work; it does not mean that the certificate of registration covers the title of the work alone, apart from the work it names: *Bowman v. Epstein*, (1937) 2 D.L.R. 555 (Ont. H.C.), Greene J. at 556.

Mere registration of a work gives no right to the exclusive use of the title under which the work is registered: see *Maxwell v. Hogg* (1867), 2 Ch. App. 307 (C.A.), Cairns J. at 317-318; *Licensed Victuallers’ Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139 (C.A.), Cotton J. at 142 and Lindley J. at 143.

§5.5 Slogans and headings

Generally, in view of their *prima facie* “unsubstantiality”, slogans, headings, advertisement lines and the like will not be considered as deserving copyright protection. For instance, “Beauty Is a Social Necessity, not a Luxury” and “Youthful Appearances are Social Necessities not Luxuries” were held too slight to constitute an original work: *Sinanide v. La Maison Kosmeo* (1928), 44 T.L.R. 574 (C.A.); see also *Kirk v. J. & R. Fleming Ltd.* (1929), (1928-1935) MacG. Cop. Cas. 44 (Ch. D.). But in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1964) 1 All E.R. 465 (H.L.), Hodson J. at 476 states that there is no

prohibition with respect to the protection of headings under the *Copyright Act* (which decision, however, is distinguishable as the debate was focused on compilations rather than mere titles).

§5.6 Berne Convention

The subject matter of protected works under the Berne Convention is primarily found in the definition of “literary and artistic works” at Article 2(1) thereof, which reads partly as follows:

The expression “literary and artistic works” shall include *every production in the literary, scientific and artistic domain, whatever be the mode or form of its expression, such as books, pamphlets and other writings* (...). (Emphasis added.)

This definition is followed by an extensive list of categories of works in which “titles” is not included. Therefore, for a title to be protected under the Berne Convention it must fall either under the general heading “production in the literary domain” or under the illustrative “other writings”.

The availability of copyright protection for titles was discussed, but to no avail. The last effort to include such a protection under the Berne Convention was made at the Brussels Conference of 1948 by way of the proposed introduction of an Article 15bis which read as follows:

A title of a literary or artistic work, which presents a distinctive character, may not be utilised by a third party to designate another work, if this designation is of such a nature as to cause confusion between the two works.

Such a proposal, however, was not accepted either because of some “reluctance to include a non-copyright type of measure in an international convention concerned with the protection of author’s rights” or practical consideration resulting from the absence of registration system to inform the authors of the availability of a particular title: see RICKETSON (Sam), *The Berne Convention for the Protection of Literary and Artistic Works; 1886-1986* (London, Centre for Commercial Law Studies, 1987), no. 6.81, at p. 313.

Therefore, despite their strong commercial value, titles and slogans are not protected as such under the Berne Convention. As summarized by LADAS (Stephen P.), *The International Protection of Literary and Artistic Property*, in *Harvard Studies in International Law* No. 3 (New York, Macmillan, 1938), Vol. 1, no. 242, at pp. 242-243:

There is no provision in the Convention concerning the protection of titles of works protected thereunder. Insofar as these are sufficiently lengthy and may be deemed to have involved labour and choice in construction, they are “writings” included in the category of “other writings” of the first

paragraph of Article 2. Otherwise, the protection of titles is a question to be governed by the laws of each country. In many countries protection may be obtained under the provisions of the law against unfair competition, whenever likelihood of confusion by the public can be established.

As to the applicability of the Berne Convention as such in Canada, see section 91.

§5.7 Other Protection for Titles

Que le titre d'un ouvrage, destiné à assurer son individualité et à la manifester au public, ne doit pas être usurpé, même pour être donné à un ouvrage d'un contenu différent; qu'il y a usurpation, même lorsqu'il est fait à ce titre des modifications insignifiantes qui laissent consulter les chances de confusion et de méprise;

-Auguste-Charles RENOUARD, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris, Jules Renouard et Cie, 1839), tome second, p. 127, no. 56.

Apart from the copyright law, misappropriation or other misuse of the title of a work could be restrained as constituting trade-mark encroachment or unfair competition.

§5.7.1 Trade-marks

For a title to be protected as a trade-mark under the *Trade-Marks Act*, (R.S.C. 1985, c. T-13), such a title should function as a trade-mark and distinguish the wares (i.e., the work or its copies) of its owner (who may be someone else than the author or copyright owner) from the wares or services of others: see definition of "trade-mark" under section 2 of that Act.

A word, design, letter, number, sign, or combination thereof may constitute a trade-mark. However, to be considered as a trade-mark, it does not have to be registered as such, and its use as a trade-mark will generally suffice.

However, for a trade-mark to be registrable, it will have to meet the requirements of subsection 12(1) of the *Trade-Marks Act*, which reads:

Subject to section 13, a trade-mark is registrable if it is not

- (a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;
- (b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which

- it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;
- (c) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;
 - (d) confusing with a registered trade-mark;
 - (e) a mark of which the adoption is prohibited by section 9 or 10;
 - (f) a denomination the adoption of which is prohibited by section 10.1;
 - (g) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a wine not originating in a territory indicated by the geographical indication; and
 - (h) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a spirit not originating in a territory indicated by the geographical indication.

Moreover, the trade-mark must not create confusion with a trade-mark or a trade name previously used, made known or applied for in Canada. Pursuant to subsections 6(2) and 6(3) the use of a trade-mark causes confusion with a trade-mark or a trade name if the use of both trade-marks or both the trade-mark and the trade name in the same area *would be likely to lead to the inference* that the wares or services associated with such trade-marks or with such trade-mark and those associated with the business carried on under such trade name are manufactured, sold, leased, hired or performed by the same person, *whether or not such wares or services are of the same general class*.

For instance, the trade-mark “the Canadian Jewish Review”, as applied to a periodical publication, was held non-registrable as clearly descriptive in the English language of the character of the wares with which it was used: *Canadian Jewish Review Ltd. v. Canada (Registrar of Trade Marks)* (1961), 37 C.P.R. 89, Cameron J. at 93 (Ex. Ct.). The trade-mark “Finishing Engineer” as the title of a periodical work was held clearly descriptive of the content and nature of the publication and the application for registration was refused: *Assn. of Professional Engineers v. Canada (Registrar of Trade Marks)*, (1959) Ex. C.R. 354, Fournier J. (Ex. Ct.). By the same token, the trade-mark “True Confessions” as applied to magazines was held unregistrable and its related registration expunged: *Fawcett Publications Inc. v. Valentine*, (1950) Ex. C.R. 246, Cameron J. at 250 (Ex. Ct.). Similarly, the registration of the trade-mark “Today’s Parent” in relation to a magazine was expunged as descriptive of a magazine dealing with parenthood: see *Professional Publishing Ltd. v. Toronto Parent Magazine* (1986), 9 C.P.R. (3d) 207, Strayer J. at p. 216 (F.C.T.D.).

While it can generally be said that the title of a work may distinguish this work from other works, it may not be as easily said that the title will distinguish the wares (for instance, a book) from a competitor’s wares (for instance, another book which could bear the same title). See, however, *Canadian Olympic*

Assn./Olympique Canadienne v. Konica Canada Inc. (1991), 39 C.P.R. (3d) 400, Hugessen J. at 405 (F.C.A.).

The rights conferred by a trade-mark under the *Trade-marks Act* are set forth in sections 19, 20, 22 and 7 thereof. See, generally: FOX (Harold George), *The Canadian Law of Trade Marks and Unfair Competition*, 3rd ed. (Toronto, Carswell, 1972) and RICHARD (Hughes G.) et al., *Robic-Leger's Trade Mark Act Annotated* (Toronto, De Boo, 1984).

§5.7.2 Passing off

Finally, apart from trade-mark registration, if a plaintiff could establish that its trade-mark, through use in Canada, has acquired a secondary and distinctive meaning or that the defendant has passed off or attempted to pass off his wares for those of the plaintiff, then a claim for passing off may prevail even if the title of the work is otherwise descriptive.

As expressed by DRYSDALE (John) et al., *Passing Off Law and Practice* (London, Butterworths, 1986), at no. 9.24: "The rights relating to the title of a literary work arising under the law of passing off are wholly separate and distinct from the copyright in the work itself and indeed these rights may belong to different people".

See, generally: FOX (Harold George), *The Canadian Law of Trade Marks and Unfair Competition*, 3rd ed. (Toronto, Carswell, 1972), at pp. 539-551 with respect to passing off by copying the titles of literary and artistic works and WADLOW (Christopher), *The Law of Passing-Off* (London, Sweet & Maxwell, 1990), at nos. 6.35-6.38.

§5.7.3 Illustrations: injunction granted

1. "The Wonderful Magazine" magazine
"The Wonderful Magazine — New Services Improved" magazine
Hogg v. Kerby (1803), 8 Ves. 215, Eldon J. (Ch.)
2. "Minnie" popular song
"Minnie" popular song
Chappel v. Sheard (1855) 2 K. & J. 117, Wood J. (Ch.)
3. "The Britannia" weekly newspaper
"True Britannia" weekly newspaper
Prowett v. Mortimer (1856) 4 W.R. 519, Stuart J. (Ch.)

4. "Bell's Life" newspaper
"Penny Bell's Life and Sporting News" newspaper
Clement v. Maddick (1859), 1 Giff. 98, Stuart J. (Ch.)
5. "The London Journal" weekly newspaper
"The Daily London Journal" weekly newspaper
Ingram v. Stiff (1859), 5 Jur. 947 (C.A.)
6. "The Birthday Scripture Text-Book" book
"The Children's Birthday Text-Book" book
Mack v. Petter (1872), 41 L.J. Ch. 781, Romilly J. (Ch. D.)
7. "Hemy's Royal Modern Tutor for the Pianoforte" musical compositions
"Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor" musical compositions
Metzler v. Wood (1877), 8 Ch. D. 606 (C.A.)
8. "Trial and Triumph" book (novel)
"Trial and Triumph" book (novel)
Weldon v. Dicks (1878), 27 W.R. 639, Malins J. (Ch. D.)
9. "Beatty's Head-line Copy Book" book
"Beatty's New and Improved Head-line Copy Book" book
Canadian Publishing Co. v. Gage (1885), 11 S.C.R. 306
10. "The Commercial Traveller and Mercantile Journal" known as "The Commercial Traveller" newspaper
"The Traveller" Journal"
Carey v. Goss (1886), 11 O.R. 619, Galt J. (Ch. D.)
11. "Church and State" weekly newspaper
"Church and State" weekly newspaper
Primrose Press Agency Co. v. Knowles (1886), 2 T.L.R. 404, (Ch. D.) Kay J.
12. "The Canadian Bookseller and Library Journal" trade journal
"The Canada Bookseller and Stationer" trade journal
Rose v. McClean Publishing Co. (1897), 24 O.A.R. 240 (C.A.)
13. "The Wrong Mr. Wright" play
"The Wrong Mrs. Wright" play
Broadhurst v. Nicholls (1903), 3 S.R. (N.S.W.) 147, Simpson J. (S.C.)

14. "Blue Bird" play
 "L'Oiseau Bleu (The Blue Bird) Valse" dance music
Elkin & Co. v. Francis Day & Hunter (1910), (1905-10) MacG. Cop. Cas. 294, Eve J. (Ch. D.)
15. "The Odd Volume" annual publication
 "The Monthly Odd Volume" monthly magazine
Alden v. Arnsby-Wilson, (1911-16) MacG. Cop. Cas. 13, Warrington J. (Ch. D.)
16. "Sealed Orders" play
 "Sealed Orders" cinematograph film
 (defendant to change its title to "Order under Seal")
Raleigh v. Kinematograph Trading Co. (1914), (1911-16) MacG. Cop. Cas. 185, Eve J. (Ch. D.)
17. "The Racing Pigeon" periodical
 "The Racing Pigeon World" periodical
 (defendant to change its title to "the Pigeon Racing World")
Racing Pigeon Publishing Co. v. Watson, (1917-23) MacG. Cop. Cas. 117, Peterson J. (Ch. D.)
18. "Dawn" movie
 "Dawn" and "At Dawn" stage play
British & Dominion Film Corp. v. Fred D'Albert Repertory Co., (1928), (1923-28) MacG. Cop. Cas. 346, Clauson J. (Ch. D.)
19. "Top Hat" magazine
 "Top Hat" magazine
 (injunction denied as to copyright, but granted as to trade-mark)
Bowman v. Epstein, (1937) 2 D.L.R. 804 (Ont. C.A.)
20. "This Man is Dangerous" novel
 "This Man is Dangerous" film
Cheyney v. Rialto Productions Ltd. (1941), (1936-45) MacG. Cop. Cas. 386, Oliver J. (K.B.D.)
21. "Annie get your gun" for a play
 "Annie get your fun" for a play
Louis Dreyfuss W.R. Productions Ltd. v. Henry's Productions Ltd. (1949), (1950) 63 D.A. 56 (Ch. Div.)
22. "Anastasia" film of a play
 "Anastasia" film

- (Injunction granted but use under conditions of the title "Is Anna Anderson Anastasia? (This is *not* a film of the play)" permitted)
Twentieth Century Fox Film Corp. v. Gala Film Distributors Ltd., (1957) R.P.C. 105, Roxburgh J. (Ch. D.)
23. "My Life and Loves" book
 "Frank Harris: My Life and Adventures" book
W.H. Allen & Co. v. Brown Watson Ltd., (1965) R.P.C. 191, Pennycuik J. (Ch. D.)
24. "Oxford Dictionaries" dictionaries
 "The Pergamon Oxford Dictionary of Perfect Spelling" and "Pergamon Oxford" dictionaries
Oxford University v. Pergamon Press Ltd. (1977), 121 Sol. Jo. 758 (C.A.)
25. "Liberté" monthly magazine
 "Liberté magazine" monthly magazine
Collectif Liberté Inc. v. Liberté-Magazine Ltee (1980), J.E. 80-277, Deslongchamps J. (Que. Sup. Ct.)
26. "Fu Nui Sun Tsz"/"New Looks of Women" television programme
 "Fu Nui Sun Tsz"/"Lady" magazine
Television Broadcasts Ltd. v. Home Guide Publication Co., (1982) F.S.R. 505, Macdougall J. (Hong Kong H.C.)
27. "What's New In..." magazines
 "What's New In Training" magazines
Morgan-Grampian plc v. Training Personnel Ltd. (1991), (1992) F.S.R. 267, Mummery J. (Ch. D.)
28. "Dark Future" for paper back futuristic novels
 "Dark Future" for paper back futuristic novels
Games Workshop Ltd. v. Transworld Publishers Ltd. (1993), (1994) 20 F.S.R. 705 (C.A.)
29. "Almanach du peuple" for a book
 "Almanach du peuple" for a book
*Groupe Polygone-Éditeurs Inc. v. Serna Communications Inc.** (1994), 59 C.P.R. (3d) 449 (Que. Sup. Ct.—Interim Injunction) Bishop J. (1994), J.E. 95-118 (Que. Sup. Ct.—Merits) Hesler J.
30. "Practical Classics" for a monthly car magazine "Classics" for a monthly car magazine
Emap National Publications Limited v. Security Publications Limited (1997), (1997) F.S.R. 891 (Ch. Div.)

§5.7.4 Illustrations: injunction denied

1. "The Pictorial Almanac For 1847" almanac
"Old Moore's Pictorial Almanac for 1847" almanac
Spottiswoode v. Clarke (1841), 2 Ph. 153, Cottenham J. (Ch.)
2. "Belgravia" magazine
"Belgravia" magazine
Maxwell v. Hogg (1867), 2 Ch. App. 307 (C.A.)
3. "Punch" weekly comic journal
"Punch and Judy" weekly comic journal
Bradbury v. Beeton (1869), 18 W.R. 33, Malins J. (Ch. D.)
4. "The Illustrated Furnishing Guide" catalogue
"F. Woodward & Co.'s Illustrated Furnishing Guide" and "New Furnishing Guide" catalogue
Cobbett v. Woodward (1872), 41 L.J. Ch. 656, Romilly J. (Ch. D.)
5. "Post Office Directory of West Riding of Yorkshire" directory
"Post Office" and "Post Office Bradford Directory" directory
Kelly v. Byles (1879), 13 Ch. D. 682, Bacon J. (Ch. D.)
6. "Splendid Misery" tale
"Splendid Misery" tale
Dicks v. Yates (1881), 18 Ch. D. 76 (C.A.)
7. "The Mail" newspaper
"The Morning Mail" newspaper
Walter v. Emmott (1885), 54 L.J. Ch. 1059 (C.A.)
8. "The Castle Album" photograph album
"The Castle Album" photograph album
Schove v. Schminké (1886), 55 L.J. Ch. 892, Chitty J. (Ch. D.)
9. "The Morning Post" daily newspaper
"The Evening Post" daily newspaper
Borthwick v. Evening Post (1888), 37 Ch. D. 449 (C.A.)
10. "The Licensed Victuallers' Mirror" weekly newspaper
"The Licensed Victuallers' Mirror" weekly newspaper

- Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139 (C.A.)
11. "Cosmopolitan Sleeve Chart" charts
"Cosmopolitan Sleeve Chart" charts
Hollinrake v. Truswell, (1894) 3 Ch. 420 (C.A.)
 12. "The Evening Express" newspaper
"The North Express" newspaper
Dillon v. Pearson, (1901), (1901-04) MacG. Cop. Cas. 17, Buckley J. (Ch. D.)
 13. "The Field, The Farm, The Garden, The County Gentleman's Newspaper" known as "The Field" magazine
"The Field and Kennel" magazine
Cox v. Sports Publishing Co. (1902), (1901-04) MacG. Cop. Cas. 27, Farwell J. (Ch. D.)
 14. "The Plumber and Decorator" and "The Decorators' and Painters' Magazine" magazines
"The Decorator" magazine
Dale Reynolds & Co. v. Trade Papers Publishing Co. (1902), (1901-04) MacG. Cop. Cas. 32, Farwell J. (Ch. D.)
 15. "M.A.P." — "Mainly About People" periodical
"P.T.O." — "People Talked Of" periodical
C. Arthur Pearson Ltd. v. O'Connor, (1906), (1905-10) MacG. Cop. Cas. 43, Joyce J. (Ch. D.)
 16. "Ewen's Current Stamp Quotations" catalogue
"Current Quotations for King's Head, & c., Colonial Stamps, a Guide to the Value of Modern Colonial Stamps" catalogue
Ewen's Colonial Stamp Market Ltd. v. Federal Stamp Co. (1907), (1905-10) MacG. Cop. Cas. 78, Phillimore J. (K.B.D.)
 17. "Cottage Homes of England" political handbook
"Cottage Homes of England" architectural book
Crotch v. Arnold (1909), 54 Sol. Jo. 49, Swinfen Eady J. (Ch. D.)
 18. "Evening Times" evening newspaper
"Evening Times" evening newspaper
George Outram & Co. v. London Evening Newspapers Co., (1911), (1911-16) MacG. Cop. Cas. 5, Warrington J. (Ch. D.)

19. "Our Sailor King" biography
 "Our Sailor King" biography
John F. Shaw & Co. v. William Collins, Sons & Co., (1911), (1911-16)
 MacG. Cop. Cas. 14, Warrington J. (Ch. D.)
20. "Where there is a Will There's a Way" play
 "Where there's a Will" play
Broemel v. Meyer, (1912), (1911-16) MacG. Cop. Cas. 56, Warrington J.
 (Ch. D.)
21. "Monthly Magazine of Fiction" magazine
 "Cassell's magazine of Fiction and Popular Literature" magazine
William Stevens Ltd. v. Cassell & Co. (1913), 29 T.L.R. 272 (Ch. D.)
22. "The New Canadian Bird Book" book
 "The New Canadian Bird Book" book
McIndoo v. Musson Book Co. (1916), 35 O.L.R. 342 (C.A.)
23. "Adventure" magazine
 "Hutchinson's Adventure Story Magazine" magazine
Ridgway Co. v. Hutchinson & Co., (1923), (1917-23) MacG. Cop. Cas.
 396, Sargant J. (Ch. D.)
24. "Hazlitt's Selected Essays" book
 "Hazlitt's Selected Essays, Edition Hollingworth" book
Cambridge University Press v. University Tutorial Press (1928), 45 R.P.C.
 335, Maugham J. (Ch. D.)
25. "How to Appeal Against your Rates in the Metropolis" and "How to
 Appeal Against your Rates outside the Metropolis" books
 "How to Appeal Against your Rates Within the Metropolis" and "How
 to Appeal Against your Rates Without the Metropolis" books
Mathieson v. Sir Isaac Pitman & Sons, Ltd. (1930), 47 R.P.C. 541,
 Maugham J. (Ch. D.)
26. "The Younger Generation" stage play
 "The Younger Generation" cinematograph film
Houghton v. Film Booking Offices Ltd. (1931), 48 R.P.C. 329, Bennett J.
 (Ch. D.)
27. "Irish and Proud of It" musical play
 "Irish and Proud of It" film
O'Gorman v. Paramount Film Service Ltd., (1937) 2 All E.R. 113, Clauson
 J. (Ch. D.)

28. "Who's Who in Canada" book
 "The Canadian Who's Who" book
International Press Ltd. v. Tunnell, (1937), (1938) 1 D.L.R. 393 (Ont. C.A.)
29. "The Man Who Broke The Bank at Monte Carlo" song
 "The Man Who Broke The Bank at Monte Carlo" film
Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp., (1939), (1940) A.C. 112 (P.C.)
30. "Sawing a Woman in Half" illusion act
 "The world-famous illusion, Sawing a Woman in Half" illusion act
Lyle v. London Society of Magicians (1943), (1936-45) MacG. Cop. Cas. 409, Uthwatt J. (Ch. D.)
31. "Annie get your gun" theatrical
 "Fanny get your gun" theatrical
Louis Dreyfuss W.R. Productions Ltd. v. Hinge's Production Ltd. (1949), (1950) D.A. 56 (Ch.)
32. "True Confessions"
 "Startling Confessions" and "Sensational Crimes Confessions"
 periodical (magazines)
 Injunction denied (Passing off and trademark infringement)
Fawcett Publications Inc. v. Valentine, (1950) Ex. C.R. 246 (Ex. Ct.)
33. "London Weekly Advertiser" and "National Advertiser" weekly papers
 "National Weekly" weekly paper
Britain Publishing Co. (London) Ltd. v. Trade & Commercial Press Ltd., (1957) R.P.C. 271, Harman J. (Ch. D.)
34. "Sports Car and Lotus Owner" magazine
 "Sports Cars Illustrated" magazine
Pearl Cooper Ltd. v. Richmond Hill Press Ltd., (1957) R.P.C. 363, Upjohn J. (Ch. D.)
35. "Today" magazine
 "Today, The New John Bull" magazine
Norman Kark Publications Ltd. v. Odhams Press Ltd., (1960), (1962) 1 W.L.R. 380, Wilberforce J. (Ch. D.)
36. "Rubber and Plastics Age" trade journal
 "Rubber and Plastics Weekly" trade journal

- Rubber & Technical Press Ltd. v. MacLawn & Sons Ltd.*, (1961) R.P.C. 264, Cross J. (Ch. D.)
37. "A passage to India" novel
"E.M. Forster, A passage to India, Everyman's Guide" guide book to the novel
Forster v. Parasuraman, (1964) A.I.R. 361 (C.A. Madras)
 38. "Votre Bottin Téléphonique" phone directory
"Le Nouveau Bottin Local" phone directory
Bottin téléphonique de votre quartier Inc. v. Nouveau bottin local Inc. (unreported) Que. Sup. Ct.-Interlocutory, Doc. No. 500-05-695-387-65, Mayrand J.S.C., October 26, 1965
 39. "Médecine d'aujourd'hui — Doctor Today" television series
"Médecine d'aujourd'hui" television series
Flamand v. Société Radio-Canada, (1967), Que. S.C. 424 (Que. S.C.)
 40. "The Cricketer" monthly magazine
"Cricketer" monthly magazine
The Cricketer Ltd. v. Newspress Pty. Ltd., (1973), (1974) V.R. 477, Kaye J. (S.C. Victoria)
 41. "The Sunday Post" newspaper
"The South East Sunday Post" newspaper
D.C. Thomson & Co. v. Kent Messenger Ltd., (1974), (1975) R.P.C. 191, Megarry J. (Ch. D.)
 42. "Morning Star" newspaper
"Daily Star" newspaper
Morning Star Co-Operative Society Ltd. v. Express Newspapers Ltd., (1978), (1979) F.S.R. 113, Foster J. (Ch. D.)
 43. "Newsweek" magazine
"Newsweek" television program
Newsweek Inc. v. British Broadcasting Corp., (1978), (1979) R.P.C. 441 (C.A.)
 44. "Athletics Weekly" magazine
"Athletics Monthly" magazine
World Athletics & Sporting Publications Ltd. v. ACM Webb (Publishing) Co., (1980), (1981) F.S.R. 27 (C.A.)
 45. "La Nouvelle" weekly newspaper

- "La Nouvelle du Haut St-François" weekly newspaper
Journal la Nouvelle Inc. v. La Nouvelle du Haut St-François Inc. (1980),
 J.E. 966-78, Savoie J. (Que. Sup. Ct.)
46. "The Lawyer's Diary 1986" diary
 "Butterworth's Law Diary 1986" diary
Rose v. Information Services Ltd., (1986), (1987) F.S.R. 254, Hoffman J.
 (Ch. D.)
47. "Mothercare" book
 "Mother Care/Other Care" book
Mothercare U.K. Ltd. v. Penguin Books Ltd., (1988) R.P.C. 113 (C.A.)
48. "Neighbours" television series
 "Neighbours Who's who" magazine
Grundy Television Pty. Ltd. v. Startrain Ltd., (1988) F.S.R. 581, Millett J.
 (Ch. D.)
49. "Opportunity Knocks" television program
 "Opportunity Knocks" television program
Green v. Broadcasting Corp. of New Zealand, (1989) 2 All E.R. 1056
 (P.C.)
50. "Tamworth Herald" and "Herald" weekly newspaper
 "Tamworth Herald and Post" weekly newspaper
Tamworth Herald Co. v. Thomson Free Newspapers Ltd., (1989), (1991)
 F.S.R. 337, Aldous J. (Ch. D.)
51. "The Gold AM" radio program
 "The Gold AM" radio program
County Sound v. Ocean Sound Ltd., (1989), (1991) F.S.R. 367 (C.A.)
52. "Leisure Week" magazine
 "Leisure News" magazine
Marcus Publishing plc v. Hutton-Wild Communications Ltd., (1989),
 (1990) R.P.C. 576 (C.A.)
53. "Style" for a fashion trade periodical
 "Style" for a section in a daily newspaper
Style Communications Inc. v. Southam Inc. (1990), 39 F.T.R. 154, Cullen
 J. (F.C.T.D.)
54. "Management Today" monthly magazine
 "Security Management Today" monthly magazine

Management Publications Ltd. v. Blenheim Exhibitions Group plc, (1991) F.S.R. 348, Hoffmann J. (Ch. D.)

55. "Gourmet" for a food magazine
 "BBC Gourmet Goodfood" for a food magazine
Advance Magazine Publishing Inc. v. Redwood Publishing Ltd. (1992), (1993) 20 F.S.R. 449, Harman J. (Ch. D.)
56. "TV Hebdo/Téléromans" for a television magazine
 "TV 7 jours/Édition spéciale téléromans:" for a television magazine,
Télémedia communications inc. v. Trustar limitée unreported judgment rendered 1994.03.08 by Sévigny J., Doc. 500-05-011025-837 (Que. Sup. Ct.—Interlocutory).
57. "Wet Wet Wet" popular group of musicians
 "A Sweet Little Mystery — Wet Wet Wet — The Inside Story" book
Bravado Merchandising Services Ltd. v. Mainstream Publishing (Edinburgh) Ltd. (1995), (1996) 23 F.S.R. 205 (Ct. of Session — Scotland)

§6.0 Case Law

§6.1 Canada

1. *New York Herald v Ottawa Citizen Co* (1909), 41 S.C.R. 229 (S.C.C.)
 Idington J.:
 (Whether the terms "Buster Brown" or "Buster Brown and Tige" for use as the title to a comic section of a newspaper can be registered as a trademark under *The Trade Mark and Design Act*, RSC 1906, c. 71.)

(17) The production which the appellant sells is not a kind of paper, or of paper coloured in any particular way or covered with a peculiar kind of ink or set forms or figures. It is the nonsense that is produced by the brain of the man writing for the diversion of the idle that in truth is sold.

(18) It may be that kind of brain product that copyright might amongst other things be extended to or that copyright might cover.

(19) I am not, however, going to wander into the field of whether or not a trade mark can exist in such a name or names, or in the name of or title given any literary production of any kind, for I am quite sure it never was intended this section should apply to such a thing.

(20) If it did, all that would be needed for a publisher of copyrighted works, when the copyright was about to expire, in order practically to add twenty-five years to the term of copyright, would be to register the title and defy any one to use it, though then at liberty to sell the thing itself without a title.

(21) I think the distinction between copyright and trade mark registration was intended by the legislature to be, and that it must be, observed in applying this Act.

2. *McIndoo v. Musson Book Co.* (1915), 35 O.L.R. 42, Masten J. (Ont. H.C.).

In this case there is no complaint that the literary composition forming the body of this work has been infringed. The two works are absolutely different. The complaint relates solely to the title.

In the case of *Dick v. Yates* (1881), 18 Ch. D. 76, Lord Justice James said (p. 93): "I desire to add that in my opinion, and I understand the Master of the Rolls to have expressed the same opinion, there cannot in general be any copyright in the title or name of a book."

This dictum appears to have been accepted from that time, and it is certain that under our statute, unless the title itself amounted to a literary, scientific, or artistic work or composition, it cannot form the subject of copyright.

No one can suggest that the words "The New Canadian Bird Book" amount to such a work or composition. The words are purely and simply descriptive of the book, nothing more or less.

The plaintiff also put his case on another ground, namely, that the defendant is selling its book under the name or title of the plaintiff's work.

This is a phase of the ordinary doctrine of "passing off" usually treated in connection with the law of trade marks.

In order to succeed in such an action the plaintiff must show that his book has become known to the public and sought for under the title adopted by him; to put it in another way, that it has acquired a public reputation under its title." (at pp. 43-44)

3. *Bowman v. Epstein*, (1937) 2 D.L.R. 555, Greene J. (Ont. H.C.).

The plaintiffs produce a certificate of copyright in the published literary work entitled "Top Hat."

In my opinion the copyright covers the contents of the magazine and does not cover the name "Top Hat". (at p. 556)

4. *International Press Ltd. v. Tunnell*, (1937), (1938) 1 D.L.R. 393, Rowell J. (Ont. C.A.).

It is a matter of common knowledge that every well-equipped public library contains a score or more of these volumes, all entitled "Who's Who." It is

clear to me that the words, "Who's Who" are *publici juris*. They are the appropriate descriptive title of a particular form of biographical dictionary of prominent people, and are known as such the world over.

It is contended, however, that while the words, "Who's Who" may be descriptive, the title "Who's Who in Canada" is not descriptive. I cannot agree: the whole title is purely descriptive. It describes and properly describes, a book containing biographical sketches of prominent people living in Canada. It is further contended by the respondents that these words have acquired secondary meaning and are known to the public as the respondents' publication, as distinguished from the publications of other companies. It is true that descriptive words may acquire secondary meaning, but the party who asserts such a claim assumes a heavy onus in trying to establish it. (at p. 411)

5. *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.*, (1939), (1940) A.C. 112, Wright J. (J.C.P.C. - Canada).

(In that case the plaintiffs claimed copyright in a song entitled "the Man Who Broke the Bank at Monte Carlo," and claimed that the use of those words as the title of a motion picture film infringed their copyright in the musical work.)

The appellant's contention was put as high as that copyright in a title is infringed by the application of that title to a work of a different character from that of the work to which it was originally applied. In the present case the title was originally applied to a musical composition, whereas it has been applied by the respondents to a motion picture or a film. The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning it would be said that the title "Adam" applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. As Jessel M.R. said in *Dicks v. Yates* ((1881), 18 Ch. D. 76 at 89) (which, as Lindley L.J. said in *Licensed Victuallers' Newspaper Co. v. Bingham* ((1888) 38 Ch. D. 139), virtually overruled on this point *Weldon v. Dicks* ((1878), 10 Ch. D. 247)) there might be copyright in a title "as, for instance, in a whole page of title or something of that kind requiring invention." But this could not be said of the facts in the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To "break the bank" is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to

constitute an infringement, especially when used in so different a connection. (at pp. 123-124)

It is, however, difficult to define satisfactorily the word "distinctive," since it cannot mean merely that the title is used to identify the particular work. In this connection regard must be had to s. 3 of the Act of 1921, which defines copyright as the "right to produce or reproduce the work or any substantial part thereof." The definition (v.) does not, in their Lordships' judgment, mean that the title of a work is to be deemed a separate and independent "work." Work is to include "the title thereof," that is to say, the title is to be treated as part of the work, provided it is original and distinctive, whatever these words may connote. When that definition is read with s. 3, the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work. This view would agree in effect with what was said by Jessel M.R. in *Dicks v. Yates* in the words quoted above, and would apply to a case such as a title covering a whole page of original matter, or something of that nature, but would not justify such a wide extension of copyright as the appellant company has contended for, or the holding of McEvoy J. (in the Ontario High Court, below) on this point. It is said that so to construe the definition is to treat it as adding nothing to the law. But the definition may have been inserted to settle doubts, and to avoid it being said that in no circumstances could a title receive protection. In any event, their Lordships do not think that the new definition (v.) entitles the appellants to succeed in this case. (at pp. 124-125)

6. *King Features Syndicate Inc. v. Lechter*, (1950) Ex. C.R. 297, Cameron J. (Ex. Ct.). (Action for, *inter alia*, infringement of plaintiff's copyright in drawings and representations of strips characters "Popeye", "Olive Oyl", "Wimpy", and "Sweetpea".)

The broad principle is that in general a title is not by itself a proper subject matter of copyright; but there may be particular cases when the title is on so extensive a scale or of so important a character as to be a proper subject of protection against being copied. The general principle, however, has been modified in Canada to a limited extent by an amendment to the Copyright Act. By section 2 of the Copyright Amendment Act, 1931, subsection (v) is added to section 2 of the Act. By that amendment "'work' shall include the title thereof when such a title is original and distinctive." The effect of the amendment was considered in the Privy Council in *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.* ((1940) A.C. 112.)....

In the case at bar the evidence establishes that the title "Popeye" was original in that it was the word coined by the plaintiffs or their predecessors in title and had not been copied from any other work; and that it was also distinctive. The defendant's admission that the use of the four characters constitutes infringement of the plaintiff's copyright therein is sufficient, I think, to establish that what the defendant copied was "a substantial part of the work" in which the plaintiffs had copyright. That is sufficient, in my view, to bring the title "Popeye", when used in conjunction with the four characters, within the protection afforded by section 2(v). I find, therefore, that not only was there infringement by the defendant by the production of the four

characters as shown in Exhibit 1 (as now admitted by the defendant), but also that the use of the word "Popeye" *in connection with such characters*, constituted an infringement of the plaintiff's rights. (at pp. 301-302)

7. *Canadian Admiral Corp. v. Rediffusion, Inc.* (1954) Ex. C.R. 382, Cameron J. (Ex. Ct.).

I have given careful consideration to the terms of the Copyright Act and more particularly to the provisions of s. 2 and 3, and the conclusion seems inescapable—at least to me—that for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. (at 394)

8. *Flamand v. Société Radio-Canada* (1967), 53 C.P.R. 217, Reid J. (Que. Sup. Ct.-translation).

I have taken into consideration all the jurisprudence and authorities cited by counsel for the parties, and in particular, both works of Fox, *Canadian Law of Trade Marks and Unfair Competition*, 2nd ed., vol. 2 (1956), and *Canadian Law of Copyright & Industrial Designs*, 2nd ed. (1967).

This author's remarks as well as those of the Judges made in the cases cited to me would seem to establish the following principles:

1. A mere title cannot form the object of a copyright independently of the work to which it relates.
2. There is no exception to this principle except when the title of a work is "original and distinctive" within the meaning of s. 2(u) (i.e., definition of "work") of the *Copyright Act*, and otherwise the title is in the public domain and is not subject to ownership.
3. When the owner of a work complains that a portion of the work has been stolen, and that this portion comprises only the title, he must prove that it is original, otherwise he cannot succeed.
4. When a person desires to obtain an injunction to prevent someone else from using a certain title, he must prove the original and distinct character of this title, *i.e.*, he must demonstrate the probability of confusion in the mind of the public between his work and that of the other person.
5. When any title cannot form the subject-matter of a copyright because of lack of originality, the party seeking an injunction to prevent its use by someone else must prove an intention on the part of this other person to deceive the public into accepting his work in place of the one belonging to the party seeking the injunction.
6. When a title does not appear to be an original creation of the mind, and cannot enjoy copyright, the difference between the two works bearing that title is sufficient to eliminate all unfair competition

because the works are not addressed to the same readers and do not satisfy the same intellectual needs.

7. When a title is purely descriptive and, consequently, devoid of originality, an injunction cannot be obtained unless the applicant proves that his adversary is attempting to pass off another work as the applicant's.
8. If, in the case of a petition for an interlocutory injunction seeking to prevent the use of a title independently of the work to which it relates, the Court entertains the slightest doubt concerning the existence of petitioner's right to the exclusive use of this title, it must dismiss the petition." (at pp. 223-225)

I am of the opinion that *prima facie*, the title of Flamand's work "*Médecine d'aujourd'hui*" is not one which meets the requirements of s. 2(u) of the *Copyright Act*, and consequently, does not appear to be either original or distinctive, so that it cannot be included in the work by Flamand which enjoys protection. (at p. 226)

9. *Cuisenaire v. South West Imports Ltd.* (1967), (1968) 1 Ex. C.R. 493, Noël J. (Ex. Ct.).

I must, therefore, conclude that section 2 (v) (i.e., definition of "work") of the Act has not altered the law in any substantial way, if at all, and that it is still necessary to find that the work in which copyright is claimed is an "original literary, dramatic, musical or artistic work" in the normal meaning of those words and in the light of the definitions in section 2 of the Act.

Indeed the only reasonable solution I can arrive at is that the Act only protects those original literary, dramatic, musical and artistic works referred to in section 4(1) (now section 5(1)) of the Act and it therefore follows that it is still necessary before section 2 (v) comes into operation to find that the work falls in one or the other of these four categories. (at p. 511)

10. *Composers', Authors' & Publishers' Assn. (Canada) v. CTV Television Network Ltd.*, (1968) S.C.R. 676, Pigeon J.

In the (Rome) Convention "oeuvres" (works) is not defined, therefore, as applied to musical works, it is properly taken in the primary sense of the composition itself, not its graphic representation as in the (Canadian Copyright) Act. (at p. 681)

11. *Fly by Nite Music Co. Ltd. v. Record Warehouse Ltd.*, (1975) F.C. 386 Mahoney J. (F.C.T.D.).

I accept the defendant's position that a phonograph record, which is nothing more than a contrivance by means of which sounds may be mechanically reproduced, does not fit comfortably within the meaning of the word "work" as that word is used in ordinary parlance. Nevertheless, its

meaning must be determined in the context of the statute. I find that the word "work" as used in the *Copyright Act* includes each and every thing in which the Act says copyright shall subsist, be that thing a product of the arts or a product of manufacture and technology. If it were otherwise, the result would be that the Act would declare that copyright subsists in a particular thing but is not open to infringement in any circumstances because of the use of the word "work" throughout sections 17 (now section 27) and 19 (now section 29, repealed).

The opening portion of section 3(1) clearly implies that, for the purposes of the Act, a lecture is a work. Likewise, it may be noted that, in section 18 (now section 28), Parliament found it necessary to make express provision to preclude the infringement of copyright in a public political speech: an unlikely beneficiary of the appellation "work" in ordinary parlance. (at pp. 393-394)

12. *Professional Publishing Ltd. v. Toronto Parent Magazine* (1986), 9 C.P.R. (3d) 207, Strayer J. (F.C.T.D.).

I am satisfied that the trade mark TODAY'S PARENT is clearly descriptive of the character of the magazine on which it appears. Such a title, when used in association with a magazine, would surely convey to most readers the information that this is a magazine dealing with matters of interest to those who are currently and fairly regularly engaged in the responsibilities of parenthood. This would in turn imply that it is a magazine intended for parents of children below the age of majority. (at p. 216)

13. *British Columbia v. Mihaljevic* (1989), 26 C.P.R. (3d) 184, Macdonell J. (B.C.S.C.).

A person cannot have copyright in a single word, name or title, because "apart from the law as to trade-marks, no one can claim monopoly rights in the use of a word or name": *Burberrys v. J.C. Cording & Co. Ltd.* (1909), 26 R.P.C. 639 at p. 701 (Ch. Div.). On this point see also *Exxon Corporation v. Exxon Ins. Consultants Int'l Ltd.*, (1981) 3 All E.R. 241 at p. 247 (C.A.), and *Tavener Rutledge Ltd. v. Trexapalm Ltd.*, (1977) R.P.C. 275 at pp. 278-9 (Ch. Div.). In order to gain exclusive use of a word or name, one must turn to the law of trade marks. (at p. 190)

On the basis of the *King Features* case (i.e., *King Features Syndicate Inc. v. Lechter*, (1950) Ex. C.R. 297 (Ex. Ct.)), the defendant's copyrights cannot prevent the plaintiff from adopting, using and registering the words "Expo" and "Expo 86" as official marks and/or trade mark. His copyrights, so far as they incorporate such marks, must then defer to the plaintiff's rights under the *Trade Marks Act*....

The defendant's copyright does not confer on him the right to exclusive use of the designs, nor does it give him a unique right to use each constituent element of such designs. Although his copyrights may have provided a valid ground for objection to the plaintiff's proposed adoption and use of the marks EXPO and EXPO 86, such copyrights cannot prevail once the

marks are registered and the rights to the exclusive use are secured to the plaintiff (under sections 9 and 11 of the *Trade Marks Act*). A copyright is, essentially, a protection against plagiarism. To set it up as a defence to a trade mark infringement action is to misconceive the nature of, and the protection offered by, a copyright. (at pp. 191-192)

14. *CCH Canadian Ltd. v. Butterworths Canada Ltd.* (1991), (1992) 1 F.C. 3, Cullen J. (F.C.T.D.)

In my view, the strength of the plaintiff's argument on the serious issue branch of the test turns on the existence of a property right, if any, that CCH can assert in the titles. If CCH can demonstrate that the titles have acquired a secondary meaning, i.e., that the titles are indicative in the minds of the public of a connection between the ACCESS works and itself as the publisher, then in my opinion there may be a serious issue to be tried....

Therefore, CCH may be able to succeed at trial in restraining the publication of Dacfo's book by Butterworths under the ACCESS titles, if it can demonstrate that the book is already recognized by the relevant sector of the public as denoting CCH's publication. In my view, this question meets the threshold injunction test of a serious issue to be tried. (at pp. 13-14)

In my opinion, the defendants are correct in stating that the copyright protection extends to the title. However, it was clearly held in *British Columbia v. Mihajjevic* (1989), 26 C.P.R. (3d) 184 (B.C.S.C.) at page 190 that a registration of copyright in a work cannot be used as a basis to restrain another from using the title as a trade mark. Therefore, the defendant's copyright is not a bar to a passing off action by the plaintiff. (at p. 20)

15. *Canadian Olympic Assn. v. Konica Canada Inc.*, (1991), (1992) 1 F.C. 797, Hugessen J. (F.C.A.).

In the first place, the respondent has pleaded its right as licensee to the copyright in the title *Guinness Book of Olympic Records*. The matter was not pressed with any vigour at the hearing and properly so. There is no indication in the material as to who the author of the title *Guinness Book of Olympic Records* may have been or when it was first published. Given the alleged antiquity of the publications, it is by no means impossible that any copyright in the title would by now have expired. Even if such copyright were still in being, however, its extent is limited by the definition of the word "work" in the *Copyright Act*, (R.S.C. 1985, c. C-42, s. 2):

.... "work" includes the title thereof *when such title is original and distinctive*; (Emphasis added.)

Apart from the word "Guinness" there is nothing that is original or distinctive in the title *Guinness Book of Olympic Records*. It is in fact a good deal less original and distinctive than the title "The Man Who Broke the Bank at Monte Carlo", with respect to which the Privy Council held use as the title of a film did not infringe copyright in a song of the same name. (See *Francis*,

Day & Hunter Ltd. v. Twentieth Century Fox Corp., (1939) 4 D.L.R. 353, (1940) A.C. 112 (P.C.).)

Finally on this aspect of the matter, the whole question of copyright is, in my respectful opinion, a red herring. Whether or not the respondent has acquired the copyright to the title *Guinness Book of Olympic Records*, what is at issue in the present case is not copyright at all but rather the right to use the word "Olympic" as a trade mark in association with films and cameras. Nothing in the *Copyright Act* touches that right in any way (By way of example, an artist who painted a picture of someone's trade mark would have copyright in his work but that would not allow him to use the work as a trade-mark. Conversely, the owner of the trade-mark could not reproduce the work without the authority of the owner of the copyright. The two rights are quite distinct.) (at pp. 810-811)

16. *Via Rail Canada Inc. v. Location Via-Route Inc.* (1992), 45 C.P.R. (3d) 96 (Que. C.A.).

It is wrong in my view to argue that registration has the effect of granting copyright to the appellant over the mark VIA. It is the logo which is protected. (translation.) (at p. 105)

17. *Non-exclusive licence issued to National Film Board of Canada Royal authorizing the reproduction of published works*, (2000), (2000) CBD 24 (Copyright Board 1992-11-30):

The Board finds that the circumstances of this case warrant that the licence fee be set at \$800.00 for the use of the musical work "*Maybe Tonight*" and at \$300.00 for the use of the cinematographic work "*Hello Toronto*". In the case of the 10-second sequence of 13 titles of newspapers articles and 21 covers of novels, the Board considers that it is not advisable to set a licence fee. Since the applicant wishes to use the titles of these literary works rather than extracts thereof, the Board considers that what is to be used is already permitted by the Act – titles are either not considered as works (Fox, *Canadian Law of Copyright*, p. 128) – or their use is of negligible value. (at p. 3)

18. *CTV Television Network Ltd. v. Canada (Copyright Appeal Board)*, (1993) 2 F.C. 115, Létourneau J. (F.C.A.).

In the CAPAC (i.e., *Composers, Authors and Publishers' Association of Canada Limited v. CTV Television Network Limited* (1968), (1968) S.C.R. 676 (S.C.C.)) case, Pigeon, writing for the Supreme Court and applying a literal construction of the *Copyright Act*, came to the following conclusions:

1. In view of the definition of "musical work" and "performance", CTV, by transmitting its entertainment programming to its affiliate stations either by shipping a copy of the video tape or by means of cable and microwave facilities, did not communicate "musical work" as defined in the Act, that it to say graphic reproductions of melody and

harmony. Rather it communicated not the "work" by a "performance of the work". (...)

3. Unlike the Canadian *Copyright Act*, The *Rome Convention* does not define "work" and the undefined word, as applied to musical work, is properly taken in the Convention in the primary sense of the composition itself, not its graphic representation as in the Act. (at pp. 128-129 F.C.)

19. *Belanger v. AT&T Canada Inc.* (1994), (1994) B.C.J. 2792, Standfield J. (B.C. County Ct.):

(36) I do not ignore, nor diminish, the commercial significance of effective advertising slogans. The examples in recent years come readily to mind. Consider, for example, the words, "Just do it", which had such enormous marketing impact for the Nike sports empire. In the context of that use no doubt the words were susceptible of trade-mark registration, but in my view they would not have constituted an "original literary work" for copyright purposes.

(37) Considering the words at issue in the case at bar, I am reminded of the Kodak jingle of some years ago: "Anytime, anywhere, in any kind of weather, it's Kodak film time: take a picture". No doubt the jingle as a whole was an original literary work, but the words "anytime, anywhere" I would have thought were not.

(38) In my view the words "Anyone, anytime, anywhere" are not materially different than the "permanent discount" words described above (in *Westfair Foods Ltd. v. Jim Pattison Industries Ltd.* (1989) BCJ 631 (BCSC)) by Mr. Justice Gibbs as "word(s) in common use in everyday speech ... combining the (three) words together will not defeat the unfettered public right to the use of them ... they fall into the classification of a "laudatory epithet" to which no one can have an exclusive right or monopoly" (at paras 36- 38)

20. *88766 Canada Inc v Reader's Digest Association, Inc* (2001), (2001) TMOB 64 (Trade-marks Office) D. Savard:

Having considered the evidence, I am satisfied that it shows use of the trade-mark in association with the registered wares. The wares are "columns of literary excerpts published in periodical magazines" and those are exactly the wares in association with which the trade-mark is being used. The trade-mark as registered appears at the top of the page as the title of the column published in the Reader's Digest magazine.

21. *United Grain Growers Ltd. v. Lang Michener* (2001), 12 CPR (4th) 89 (FCA) Rothstein J.

(7)As the Trial Judge did not issue separate reasons for his decision, it is necessary to consider the reasons of the Registrar. The Registrar found that the main issue was whether the evidence showed use of the words "Country

Living" as a trade-mark for magazines. In answering this question in the negative, the Registrar found that the use of the words Country Living did not distinguish the appellant's magazine from those of others. The title of the magazine *Country Guide* appeared on the cover and on each page of the magazine, including pages where the "Country Living" section was featured. "Country Living" was not listed in the table of contents in a manner that was any different from any of the other major sections. Although consumers might flip through the magazine before purchasing it and might buy the magazine specifically for the "Country Living" section, it was the use of the words *Country Guide* which distinguished the appellant's magazine from those of others in the minds of consumers, not the use of the words "Country Living".

(14) In our respectful opinion, in embarking upon an inquiry as to whether the words "Country Living" were used to distinguish the appellant's magazine, the Registrar misinterpreted her function under section 45 and erred in law. No words in section 45 direct the Registrar to re-examine whether the registered trade-mark is used for the purpose of distinguishing, or so as to distinguish, wares. Rather, the Registrar's duty under section 45 is only to determine, with respect to the wares specified in the registration, whether the trade-mark, as it appears in the register, has been used in the three years prior to the request.

(15) In this case, it is undisputed that the registered trade-mark "Country Living" was marked on the magazine *Country Guide* at the time of transfer of property in or possession of the magazine in the normal course of trade. We think once it was determined that the registered trade-mark, as it appears in the register, was used in association with the wares specified in its registration, the inquiry under section 45 was at an end.

22. *Cité Amérique Distribution Inc. v C.E.P.A. Le Baluchon Inc* (2002), (2002) CarswellQue 1568 (QueSupCt) Bishop J.

64 Probablement les mots "Marguerite Volant", utilisés seuls, ne sont pas originaux, parce qu'ils proviennent des recherches historiques d'une tierce personne. Cependant, lorsque ce titre est utilisé par rapport à l'oeuvre originale qu'il décrit, le titre devient une partie intégrante de cette oeuvre et participe à son originalité. Le caractère distinctif du titre est évident; c'est le nom de l'héroïne de l'oeuvre, qui permet de distinguer l'oeuvre, de la particulariser.

§6.2 United Kingdom

1. *Kelly v. Hutton* (1868), 3 Ch. 703, Page Wood J. (C.A.).
Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication (...) (at p. 708)
1. *Weldon v. Dicks* (1878), 27 W.R. 639, Malins J. (Ch. D.).

(overruled on this point by *Dicks v. Yates* (1881), 18 Ch. D. 76 (C.A.)).

But to say that there is no property in a name as part of a book or other publication is absurd. The title of a book is a material part of the book, and entitled to the same protection as the book itself. (at p. 641)

2. *Dicks v. Yates* (1881), 18 Ch. D. 76, Jessell J. and Lush J. (C.A.).

We come then to the question of copyright. Now I do not say that there could not be copyright in a title, as, for instance, in a whole page of title or something of that kind requiring invention. However, it is not necessary to decide that. But, assuming that there can be copyright in a title, what does copyright mean? It means the right to multiply copies of an original work. If you complain that a part of your work has been pirated, you must show that that part is original, and if it is not original, you have no copyright. How can the title "*Splendid Misery*" be said to be original, when the very same words for the very same purpose were used nearly eighty years ago? ... Therefore in this case, even assuming you could establish a right to the title as original, if it was reinvented you have no evidence of reinvention, but you have evidence of the prior publication. It seems to me, therefore, on that ground also that the action must be dismissed." (Jessell J. at p. 89)

(This case) turns on the simple question whether there can be copyright in the title "*Splendid Misery*," and I am clearly of opinion that there cannot. I take it to be established law that to be the subject of copyright the matter must be original, it must be a composition of the author, something which has grown up in his mind, the product of something which if it were applied to patent rights would be called invention. Nothing short of that would entitle a man to copyright. Now, can it be said there is anything original in these two words? I suppose there is hardly a person who has grown to maturity in this country who has not read them hundreds of times and heard them spoken hundreds of times. To my mind "*Splendid Misery*" is a hackneyed phrase. Moreover, it is in evidence that about eighty years ago a novel was published with that very title, and that, though it is out of print, second hand copies are still to be met with. If, therefore, we were to go no further back than that, the title has been known to the public for at least eighty years, and I cannot help thinking that the phrase originated many years before that. It was one likely to be coined in a very early age, and is one which, as I said before, most people have read and heard hundreds of times. That of itself is enough to determine the case. There is nothing original in the title. There is nothing in it that indicates any intellectual effort. There is nothing more than the taking up a phrase which had long been in public use. It has become a public property, and it is impossible that a person can appropriate it and claim copyright in it. (Lush J. at pp. 92-93)

3. *Osbourne v. J.M. Dent & Sons Ltd.* (1925), 94 L.J. Ch. 308, Romer J. (Ch. D.)

Whether each instalment is a "work" within the meaning of the proviso to section 3 of the Copyright Act, 1911, it is not easy to say. The Act contains no definition of a "work". Section 15, sub-section 2, however, refers to a "work published in a series of numbers or parts," and it would look as

though, for the purposes of the Act, a novel, though published in parts, is, when completed, to be regarded as a "work." But in the case of essays, short stories, or poems, separately published, each would be a work, and to remain a work even after published in volume form with others. The volume itself cannot very well be a work. It is in truth a collection of works. If the plaintiff's contention be accepted, the practical result will therefore be that, so far as such works are concerned, the proviso to section 3 might just as well have been omitted from the Act.

It appears to me, however, that the proviso is capable of a construction that avoids such a result, and, if so, it is my duty to adopt that construction in preference to that advanced by the plaintiff. By virtue of section 1 of the *Interpretation Act, 1889*, the word "work" in the singular where used in the proviso includes the word "works" in the plural, no intention to the contrary appearing in the proviso. So read, there can be no difficulty in the defendants stating that the price or prices at which they intend publishing such of Stevenson's works as they desire to publish. (at p. 311)

4. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1964) 1 All E.R. 465, Hodson J. (H.L.).

It was submitted by the appellants that these headings (showing the choice of bets) were the equivalent of titles of a book or play and that titles could not be protected. They relied on two cases, *Dicks v. Yates* ((1881), 18 Ch. D. 76) and *Francis Day & Hunter, Ltd. v. Twentieth Century Fox Corpn.*, ((1939) 4 All E.R. 192; (1940) A.C. 112) neither of which support the proposition that, as a matter of law, copyright cannot subsist in titles. No doubt they will not as a rule be protected, since alone they would be regarded as a sufficiently substantial part of the book or other copyright document to justify the preventing of copying by others. In any event, there is good authority for the protection of headings in a proper case in *Lamb v. Evans* ((1893) 1 Ch. 218) where the headings in question were elaborated and given in each case in English, French, German and Spanish. (at p. 476)

5. *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, (1981), (1982) R.P.C. 69, Graham J., (Ch. D.).

As I have already stated, the question that I have to decide is, shortly stated, whether Exxon is an "original literary work" within the meaning of section 2? I do not think it is. What is it then, one may ask? It is a word which, though invented and therefore original, has no meaning and suggests nothing in itself. To give it substance and meaning, it must be accompanied by other words or used in a particular context or juxtaposition. When used as part of any of the plaintiffs' corporate names, it clearly has a denominative characteristic as denoting the company in question. When used, as I assume it is, with the plaintiffs' goods, it would clearly have the effect of denoting origin or quality. It is in fact an invented word with no meaning, which is a typical subject for trade mark registration, and which no doubt, with adequate use, is capable also of becoming, it has not already become, distinctive of the plaintiffs and their goods at common law. It is not in itself a title or distinguishing name and, as I have said, only

takes on meaning and significance when actually used with other words, for example indicating that it is the name of a company, or in a particular juxtaposition as, for example, on goods.

Nothing I have said above is intended to suggest that I consider that a word which is used as a title can, as a matter of law, never in any circumstances be the subject of copyright, and I would disagree with dicta in previous cases to the contrary effect. Such a word would, however, I think, have to have qualities or characteristics in itself, if such a thing is possible, which would justify its recognition as an original literary work rather than merely as an invented word. It may well turn out not to be possible in practice, but, as at present advised, I consider that the mere fact that a single word is invented and that research or labour was involved in its invention does not in itself, in my judgment, necessarily enable it to qualify as an original literary work within section 2 of the Act. (at pp. 78-79)

But could Lewis Carroll, if he had merely invented the word "Jabberwock" and had never written the poem of which it is a part, have successfully contended that he had copyright in the word alone? In the absence of its registration as a trade mark, could he, by virtue of copyright, prevent a commercial company adopting it as part of such company's corporate name? I think not, the legal reason being that the word alone and by itself cannot be considered as a "literary work", the subject of copyright under the Act. It becomes part of a "literary work" within the Act when it is embodied in the poem, but it is the poem as a composition which is a work within the Act and not the word itself. (at pp. 79-80)

6. *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, (1981), (1982) R.P.C. 81, Oliver L.J., (C.A.).

But that for which protection is sought in the instant case (i.e., the word "EXXON") does not appear to me to have any of the qualities which common-sense would demand. It conveys no information; it provides no instruction; it gives no pleasure that I can conceive; it is simply an artificial combination of four letters of the alphabet which serves a purpose only when it is used in juxtaposition with other English words, to identify one or other of the companies in the plaintiff group. (at p. 90)

7. *Mothercare U.K. Ltd. v. Penguin Books Ltd.*, (1988) R.P.C. 113, Dillon J. (C.A.).

It is clear that the title of a book is not ordinarily used as a trade mark, because it ordinarily gives no indication about the book's trade origin. The title may also be descriptive. (...) The more descriptive a title is of the contents of a book, the harder it is to find that it is used in a trade mark sense.

8. *Marcus Publishing plc v. Hutton-Wild Communications Ltd.*, (1989), (1990) R.P.C. 576, headnotes 2 and 3 (C.A.).

(2) While ordinary descriptive words could come by use to acquire a special meaning, the law is reluctant to allow such words to be fenced off so as to become the private preserve of one particular tradesman.

(3) To establish the tort of passing off, it was essential for the plaintiff's proprietary right and goodwill in the name in question to be made out; mere confusion was not enough to warrant the grant of an injunction. In particular, there was no basis for claiming goodwill in the name of a newspaper or magazine if that newspaper or magazine was not yet on the market. (at p. 577)

9. *Noah v. Shuba* (1990), (1991) F.S.R. 14, Mummery J. (Ch. D.).

It is not necessary for me to decide the alternative argument. I have, however, heard argument from both sides and I can say that I would have rejected Dr. Noah's submission that the two last sentences (i.e., "Follow clinic procedure for aftercare. If proper procedures are followed, no risk of viral infections can occur.") on their own constituted a "work" within the meaning of section 43 (i.e., false attribution of authorship). Those two sentences on their own do not afford sufficient information, instruction or literary enjoyment to qualify as a work: see *Exxon Corporation v. Exxon Insurance Consultants International Limited* (1982) Ch. 119. (at p. 33)

10. *Games Workshop Ltd. v. Transworld Publishers Ltd.* (1993), (1994) 20 F.S.R. 705, Balcombe J. (C.A.).

The judge went on to say that the mark "Dark Future" was not notably descriptive of the contents of either series of books. We would be prepared to accept that the mark may here be partially descriptive of the books' contents. However, the mark, as applied to the plaintiffs' and Transworld's novels is not clearly as descriptive of their contents as the title "Mothercare/other care," the subject of complaint in the *Mothercare* case (*Mothercare U.K. Ltd. v. Penguin Books Ltd.* (1988), (1988) R.P.C. 113 (C.A.)), was of the contents of that non-fiction book. Further, as the judge said:

In any case, "Dark Future" is not just the title of any of the books; it is the name of a series in each case. Transworld, like GW, sells its book as part of its "Dark Future" series. That is made clear by the figures 1 to 4 besides the words "Dark Future" on the front covers and the references elsewhere in the books to other volumes in the same series, also in Transworld advertising, and its points of sale display where the titles are displayed together under a large "Dark Future".

We agree with the judge that the use of "Dark Future" as the title of a series of books is significantly different from its use as the title of a single book. It might be considered comparable to the title of a periodical magazine, which has been held to be used as a trade mark - see *John Leng Ltd. v. Gold Star Publications* (1967) F.S.R. 75. (at pp. 711-712)

§6.3 United States

1. *Re Cooper*, 117 U.S.P.Q. 396, Rich J. (C.C.P.A. 1958).

Nothing we say should be taken as implying that no trademark for books can be registered; but before there can be registration there must be a trademark and a trademark exists only where there has been trademark use. (at p. 398)

The purchaser of a book is not asking for a "kind" or "make" of book. He is pointing out which one out of millions of distinct titles he wants, designating the book by its name. It is just as though one walked in a grocery store and said "I want some food" and in response to the question "What kind of food?" said, "A can of chicken noodle soup." (at p. 399)

But however arbitrary, novel or non-descriptive of *contents* the name of a book - its title - may be, it nevertheless *describes* the book. Appellant has nowhere attempted to answer the question. How else do you describe it - what else would you call it? If the name or title of a book were not available as a description of it, an effort to denote the book would sound like the playing of the game "Twenty Questions." (at p. 400)

2. *Brown v. Lyle Stuart, Inc.*, 141 U.S.P.Q. 936, Nunez J. (N.Y.S.C. 1964).

If plaintiff's title has acquired a secondary meaning and the defendant's use of an allegedly similar title constitutes an unfair business practice, and unfair competition, a court of equity has the power to grant the relief sought. (at p. 937)

Where titles of books are involved, as distinguished from those of plays, motion pictures and the like, the court will be more reluctant to find unfair competition because book buyers generally place more importance upon the author than upon the title of a literary work. (at p. 938)

3. *Paramount Pictures Corp. v. Dorney Park Coaster*, 9 U.S.P.Q. (2d) 1161, Troutman J. (D.C.E.D Penn. 1988).

Consequently, we find that the title "TOP GUN" is, at least descriptive and that Paramount has developed secondary meaning for the name "top gun". Although defendant produced evidence of other uses of the term prior to the movie, specifically with respect to the naval training facility described in the movie, the circumscribed and sporadic instances of "advertising" of the Miramar facility through air shows, catalogue offerings of facsimile equipment and insignia, such evidence is not sufficient to show more than minimal impact upon the public consciousness. (at p. 1164)

4. *Rogers v. Grimaldi*, 10 U.S.P.Q. (2d) 1825, Newman J. (2nd Cir. 1989).

The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product. Thus, it is well established that where the title of a movie or a book has acquired secondary meaning -that is, where the title is sufficiently well known that consumers associate it with a

particular author's work - the holder of the rights to that title may prevent the use of the same or confusingly similar titles by other authors. (at p. 1827)

5. *Takeall v. Pepsico Inc.*, 29 U.S.P.Q. (2d) 1913 (4th Cir. 1993).
We are of the view that the disputed phrase ("You got the right one, uh-uh") fails to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable. (at p. 1918)

6. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc* (1997), 42 USPQ2d 1184, (CA 9th Cir) O'Scannlain J.
Under this factor, the inquiry is whether *The Cat NOT in the Hat!* merely supersedes the Dr. Seuss creations, or whether and to what extent the new work is "transformative," i.e., altering *The Cat in the Hat* with new expression, meaning or message. Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment. This court has adopted the "conjure up" test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to "recall" or "conjure up" the object of his parody. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 184 (2d Cir.1981); *Warner Bros., Inc. v. American Broadcasting Cos.*, 523 F.Supp. 611, 617 (S.D.N.Y.), *aff'd*, 654 F.2d 204 (2d Cir.1981); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir.1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979). Accordingly, the critical issue under this factor is whether *The Cat NOT in the Hat!* is a parody. (...) See *Acuff-Rose*, 510 U.S. at 582, 114 S.Ct. at 1173 ("The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.").

7. *Ludden v. Metro Weekly* (1998), 47 U.S.P.Q. (2d) 1087, Green J. (D.C. Columbia).
Relying solely on the present record, the Court holds that under the Lanham Act a newspaper or magazine column is capable of being a good or service distinct from the publication in which it appears and, therefore, that the title of a newspaper column or magazine is amenable to protection as a trademark in its own right so long as it meets the other requirements, such as distinctiveness and use. (at p. 1093)

8. *Mattel Inc. v MCA Records inc* (2002), 63 USPQ2d 1715 (CA 9th) Kozinzinski J.
B. There is no doubt that MCA uses Mattel's mark: Barbie is one half of Barbie Girl. But Barbie Girl is the title of a song about Barbie and Ken, a reference that—at least today—can only be to Mattel's famous couple. We expect a title to describe the underlying work, not to identify the producer, and Barbie Girl does just that. The Barbie Girl title presages a song about Barbie, or at least a girl like Barbie. The title conveys a message to consumers about what they can expect to discover in the song itself; it's a

quick glimpse of Aqua's take on their own song. The lyrics confirm this: The female singer, who calls herself Barbie, is "a Barbie girl, in (her) Barbie world." She tells her male counterpart (named Ken), "Life in plastic, it's fantastic. You can brush my hair, undress me everywhere / Imagination, life is your creation." And off they go to "party." The song pokes fun at Barbie and the values that Aqua contends she represents. (...)

(2) The song does not rely on the Barbie mark to poke fun at another subject but targets Barbie herself. (...)

(3) The Second Circuit has held that "in general the (Lanham) Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (...)

(4) A title is designed to catch the eye and to promote the value of the underlying work. Consumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer. See *Application of Cooper*, 254 F.2d 611, 615-16 (C.C.P.A. 1958) (A "title . . . identifies a specific literary work, . . . and is not associated in the public mind with the . . . manufacturer." (internal quotation marks omitted)). If we see a painting titled "Campbell's Chicken Noodle Soup," we're unlikely to believe that Campbell's has branched into the art business. Nor, upon hearing Janis Joplin croon "Oh Lord, won't you buy me a Mercedes-Benz?," would we suspect that she and the carmaker had entered into a joint venture. A title tells us something about the underlying work but seldom speaks to its origin:

Though consumers frequently look to the title of a work to determine what it is about, they do not regard titles of artistic works in the same way as the names of ordinary commercial products. Since consumers expect an ordinary product to be what the name says it is, we apply the Lanham Act with some rigor to prohibit names that misdescribe such goods. But most consumers are well aware that they cannot judge a book solely by its title any more than by its cover. *Rogers*, 875 F.2d at 1000 (citations omitted).

(5) *Rogers* concluded that literary titles do not violate the Lanham Act "unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." *Id.* at 999 (footnote omitted).

(6) Applying *Rogers* to our case, we conclude that MCA's use of Barbie is not an infringement of Mattel's trademark. Under the first prong of *Rogers*, the use of Barbie in the song title clearly is relevant to the underlying work, namely, the song itself. As noted, the song is about Barbie and the values Aqua claims she represents. The song title does not explicitly mislead as to the source of the work; it does not, explicitly or otherwise, suggest that it was produced by Mattel. The *only* indication that Mattel might be associated with the song is the use of Barbie in the title; if this were enough to satisfy this prong of the *Rogers* test, it would render *Rogers* a nullity.

§6.4 Varia

1. *Forster v. Parasuraman*, (1964) A.I.R. 331, Anantanarayanan J. (Madras C.A.).

It has been clearly laid down that there is no copyright in a 'title' as such, since this is not substantially enough to merit the claim to protection. It may be capable of protection only in a "passing off" action: see *Dicks v. Yates*, (1881) 18 Ch. D. 78 and other authorities listed in Halsbury (Simonds Edn.) Vol. 8, p. 377, under paragraph 69 I. (at p. 333)

2. *Colmax v. Archange International* (2001), 191 RIDA 280 (CA Versailles, 12^e Chambre; 2001-01-11)

Mais considérant qu'indépendamment de la notion d'antériorité, laquelle est inopérante dans le cadre de l'application du droit de la propriété littéraire et artistique, le titre d'une œuvre peut bénéficier d'une protection légale, dès lors qu'il satisfait au critère de l'originalité en tant qu'il traduit l'empreinte de la personnalité de son auteur; (at p. 281.)

(...)

Il s'ensuit que la reproduction de ce titre (Angélique) par la société appelante constitue une atteinte aux droits que détient Mme Goloubinoff et la société Archange International sur la marque déposée (Angélique Marquise des Anges), laquelle a vocation à protéger un produit ou un service, à savoir une série littéraire célèbre.

§7.0 List of Cases

§7.1 Canada

§7.1.1 General

1. *Canada Publishing Co. v. Gage* (1884), 6 O.R. 68 (Ont. H.C.); aff'd (1884), 11 O.A.R. 402 (Ont. C.A.); aff'd (1885), 11 S.C.R. 306.
2. *Harris v. Canadian Music Sales Corp.*, (1941) O.W.N. 99 (Ont. C.A.).
3. *King Features Syndicate Inc. v. Lechter* (1950), 12 C.P.R. 60 (Ex. Ct.).
4. *Canadian Admiral Corp. v. Rediffusion, Inc.* (1954), 20 C.P.R. 75 (Ex. Ct.).
5. *Composers', Authors' & Publishers' Assn. (Canada) v. CTV Television Network Ltd.* (1966), 48 C.P.R. 246 (Ex. Ct.); quashed on other grounds (1968) S.C.R. 676.

6. *Cuisenaire v. South West Imports Ltd.* (1967), 54 C.P.R. 1 (Ex. Ct.); aff'd (1968), 57 C.P.R. 76 (S.C.R.).
7. *Blue Crest Music Inc. v. Compo Company Ltd.* (1974), 17 C.P.R. (2d) 149 (F.C.T.D.); (1976), 30 C.P.R. (2d) 14 (F.C.A.); (1979), 45 C.P.R. (2d) 1 (S.C.C.).
8. *Fly by Nite Music Co. Ltd. v. Record Warehouse Ltd.* (1975), 20 C.P.R. (2d) 263 (F.C.T.D.).
9. *Rocky Mountain Dance Co. v. Brookes* (1987), 19 C.P.R. (3d) 131 (F.C.T.D.).
10. *British Columbia v. Mihaljevic* (1986), 2 B.C.L.R. (2d) 190 (B.C.S.C.—Interlocutory Injunction); (1989), 26 C.P.R. (3d) 184 (B.C.S.C.); aff'd (1991), 36 C.P.R. (3d) 445 (B.C.C.A.); leave to appeal to the Supreme Court of Canada refused 39 C.P.R. (3d) v.
11. *Preston v. 20th Century Fox Canada Ltd.* (1990), 33 C.P.R. (3d) 249 (F.C.T.D.); aff'd (1993), 53 C.P.R. (3d) 407 (F.C.A.).
12. *CTV Television Network Ltd. v. Canada (Copyright Appeal Board)* (1990), 30 C.P.R. (3d) 262 & iv (F.C.T.D.); aff'd (1993), 46 C.P.R. (3d) 343 (F.C.A.); application for leave to appeal to the Supreme Court of Canada refused (1993), 51 C.P.R. (3d) v.
13. *CCH Canadian Ltd. v. Butterworths Canada Ltd.* (1991), 36 C.P.R. (3d) 417 (F.C.T.D.).
14. *Non-exclusive licence issued to National Film Board of Canada Royal authorizing the reproduction of published works*, unreported decision rendered 1992.11.30 by the Copyright Board, file no. U0-1992-10.
15. *Via Rail Canada Inc. v. Location Via-Route Inc.* (1992), 45 C.P.R. (3d) 96 (Que. C.A.).
16. *Belanger v. AT&T Canada Inc.* (1994), (1994) B.C.J. 2792 (B.C. County Ct.).
17. *Westfair Foods Ltd. v. Jim Pattison Industries Ltd.* (1989), (1989) B.C.J. 631 (BCSC-Interlocutory Injunction).

18. *Shewan v. Canada (Attorney General)* (1999), O.J. 2790 (Ont. Gen. Div.).

§7.1.2 Titles of periodicals

1. *Carey v. Goss* (1886), 11 O.R. 619 (Ch. D.).
2. *New York Herald v Ottawa Citizen Co* (1908), 12 Ex.C.R. 1 (Ex.Ct.); aff'd (1909), 41 S.C.R. 229 (S.C.C.).
3. *Bowman v. Epstein*, (1937) 2 D.L.R. 555 (Ont. H.C.); aff'd (1937) 2 D.L.R. 804 (Ont. C.A.).
4. *Bottin téléphonique de votre quartier Inc. v. Nouveau bottin local Inc.* (unreported), Que. Sup. Ct., Doc. No. 500-05-695-387-65, Mayrand J., October 26, 1965; discontinuance of action filed.
5. *Collectif Liberté Inc. v. Liberté-magazine Lteé* (1980), J.E. 80-277 (Que. Sup. Ct.—Interlocutory); declaration of settlement out of court filed 1980.11.12.
6. *Journal la Nouvelle Inc. v. La Nouvelle du Haut St-François Inc.* (1980), J.E. 966-78 (Que. Sup. Ct.).
7. *T.V. Guide Inc. v. Publications La Semaine Inc.* (1984), 9 C.P.R. (3d) 368, 6 C.I.P.R. 110 (Que. Sup. Ct.).
8. *Télémedia Communications Inc. v. Trustar limitée*, unreported judgment rendered 1994.03.08 by Sévigny J., Doc. 500-05-011025-837 (Que. Sup. Ct.—Interlocutory).
9. *88766 Canada Inc v Reader's Digest Association, Inc* (2001), (2001) T.M.O.B. 64 (Trade-marks Office).
10. *United Grain Growers Ltd. v. Lang Michener* (1998), (1998) T.M.O.B. 222 (TMOB, sub nomine *United Grain Growers Ltd. (Re)*); aff'd by an unreported decision of the Trial Division of the Federal Court of Canada; rev'd (2001), 12 C.P.R. (4th) 89 (FCA); leave to appeal to the Supreme Court of Canada allowed (2001), 276 N.R. 198 (note) (SCC); discontinuance appeal filed on 2002-05-15 (S.C.C.).

§7.1.3 Titles of books

1. *Canada Publishing Co. v. Gage* (1884), 6 O.R. 68 (Ont. H.C.); aff'd (1884), 11 O.A.R. 402 (Ont. C.A.); aff'd (1885), 11 S.C.R. 306.
2. *Rose v. McLean Publishing Co.* (1897), 27 O.R. 325 (Ont. Div. Ct.); rev'd (1897), 24 O.A.R. 240 (Ont. C.A.).
3. *McIndoo v. Musson Book Co.* (1915), 35 O.L.R. 42 (Ont. H.C.); aff'd (1916), 35 O.L.R. 342 (Ont. C.A.).
4. *International Press Ltd. v. Tunnell*, (1937), (1938) 1 D.L.R. 393 (Ont. C.A.).
5. *Zlata v. Lever Brothers Ltd.* (1948), 9 C.P.R. 34 (Que. Sup. Ct.).
6. *Canadian Olympic Assn. v. Konica Canada Inc.* (1987), 18 C.P.R. (3d) 470 (F.C.T.D.—Interlocutory); (1990), 30 C.P.R. (3d) 60 (F.C.T.D.); rev'd (1991), 39 C.P.R. (3d) 400 (F.C.A.); leave to appeal refused (1992), 41 C.P.R. (3d) v (S.C.C.).
7. *CCH Canadian Ltd. v. Butterworths Canada Ltd.* (1991), 36 C.P.R. (3d) 417 (F.C.T.D.).
8. *Groupe Polygone-Éditeurs Inc. v. Serna Communications Inc.* (1994), 59 C.P.R. (3d) 449 (Que. Sup. Ct.—Interim Injunction); (1994), J.E. 95-118 (Que. Sup. Ct.—Merits) Hesler J.
9. *Jacob v. Boisseau* (1996), J.E. 96-1228 (Que. Sup. Ct.); appeal 500-09-002620-961.

§7.1.4 Titles of plays

1. *Francis, Day & Hunter, Ltd. v. Twentieth Century Fox Corp.*, (1937) 4 D.L.R. 700 (Ont. H.C.); rev'd (1938) 3 D.L.R. 375 (Ont. C.A.); (1939), 8 F.L.J. 163 (J.C.P.C.—Motion for leave); aff'd (1939) 4 All. E.R. 192, (1939) 4 D.L.R. 353 (J.C.P.C.—Canada).
2. *Flamand v. Société Radio-Canada* (1967), 53 C.P.R. 217 (Que. Sup. Ct.).
3. *Rochat v. Société Radio-Canada*, (1974) C.S. 638 (Que. Sup. Ct.).
4. *Cité Amérique Distribution Inc. v C.E.P.A. Le Baluchon Inc* (2002), (2002) CarswellQue 1568 (Que. Sup.Ct.)

§7.1.5 **Varia**

1. *National Publishing Co. v. Lloyd* (1938), 8 Fortnightly Law Journal 37 (Ont. County Ct.).
2. *Fawcett Publications Inc. v. Valentine* (1950), 13 C.P.R. 1 (Ex. Ct.).
3. *Assn. of Professional Engineers v. Canada (Registrar of Trade Marks)* (1959), 31 C.P.R. 79 (Ex. Ct.).
4. *Canadian Jewish Review Ltd. v. Canada (Registrar of Trade Marks)* (1961), 37 C.P.R. 89 (Ex. Ct.).
5. *Laidlaw v. Metropolitan Toronto (Municipality)* (1974), 7 L.C.R. 111 (Land Comp. Bd.); rev'd (1976), 9 L.C.R. 269 (Ont. Div. Ct.); rev'd (1976), 9 L.C.R. 269 (Ont. C.A.); rev'd (1978) 2 S.C.R. 736.
6. *Professional Publishing Ltd. v. Toronto Parent Magazine* (1986), 9 C.P.R. (3d) 207 (F.C.T.D.); rev'd on consent by judgment of the Federal Court of Appeal rendered (January 5, 1987) (F.C.A.).
7. *Style Communications Inc. v. Southam Inc.* (1990), 39 F.T.R. 154 (F.C.T.D.—Interlocutory Injunction).

§7.2 **United Kingdom**

§7.2.1 **General**

1. *Maxwell v. Hogg* (1867), 2 Ch. App. 307 (C.A.).
2. *Kelly v. Hutton* (1867), 37 L.J. Ch. 297 (Ch. D.); var'd (1868), 3 Ch. App. 703, 37 L.J. Ch. 917 (C.A.); (1869), 20 L.T. 201 (C.A.).
3. *Mack v. Petter* (1872), L.R. 14 Eq. 431 (Ch. D.).
4. *Weldon v. Dicks* (1878), 10 Ch. D. 247 (Ch. D.).
5. *Dicks v. Yates* (1881), 18 Ch. D. 76 (Ch. D.); rev'd (1881), 18 Ch. D. 76 (C.A.).
6. *Schove v. Schminké* (1886), 33 Ch. D. 546 (Ch. D.).

7. *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139 (C.A.).
8. *Hollinrake v. Truswell*, (1893) 2 Ch. 377 (Ch. D.); rev'd (1894) 3 Ch. 420 (C.A.).
9. *Osbourne v. J.M. Dent & Sons Ltd.*, (1925) Ch. 369 (Ch. D.).
10. *Sinanide v. La Maison Kosmeo* (1928), 139 L.T. 365 (C.A.).
11. *Kirk v. J. & R. Fleming Ltd.* (1929), (1928-1935) MacG. Cop. Cas. 44 (Ch. D.).
12. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, (1962) C.L.Y. 509, 107 Sol. Jo. 34 (C.A.); aff'd (1964) 1 All E.R. 465 (H.L.).
13. *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, (1981) 2 All E.R. 495 (Ch. D.); aff'd (1981) 3 All E.R. 241 (C.A.); leave to appeal to the House of Lords refused (1982) R.P.C. 69.
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§9.0 Varia

§9.1 Canada Copyright Office Circular No. 8 — 1997-10-01

Unprotected Items: Ideas, Titles, Names and Slogans

Ideas are not protected by copyright. Copyright does extend to the form of expression used by an author in conveying or explaining his or her ideas but does not extend to the ideas themselves which become public property the moment they are disclosed.

In order to be eligible for protection under the Copyright Act, a work must contain a minimal amount of original creative authorship, be it in the literary, musical or artistic fields. Slogans, short phrases and names do not usually meet this requirement and are generally not protected under copyright legislation.

A title is used to identify a work and is not usually, in itself, protected by copyright.

Names, words, symbols or designs used in association with or to identify, goods or services are eligible for protection under the Trade-marks Act. Any inquiries in that respect should be directed to the Trade-marks Office, part of the Canadian Intellectual Property Office.

This information is to be considered solely as a guide and should not be quoted as, or considered to be, a legal authority. It may become obsolete without notice. Authority must be found in the Copyright Act, the Copyright Regulations and in the decisions of the Courts interpreting them.

§9.2 US Copyright Office Circular No. 34 — November 1997

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- Names of pseudonyms of individuals (including pen name or stage name)
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- Catchwords, catchphrases, mottoes, slogans, or short advertising expressions
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World Wide Web: <http://www.loc.gov/copyright>
Telnet: [locis.loc.gov](telnet://locis.loc.gov)
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However, the presence of a title in the Copyright Office registration records does not mean that the title itself is copyrighted or subject to copyright protection. In many cases, our records show the same or closely similar titles for entirely different works.

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Some brand names, trade names, slogans, and phrases may be entitled to protection under the general rules of law relating to unfair competition, or they may be entitled to protection and registration under the provisions of state or Federal trademark laws. The Federal trademark statute covers trademarks and service marks — those words, phrases, symbols or designs that identify the source of the goods or services of one party and distinguish them from those of others. The Copyright Office has no role in these matters.

ROBIC + LAW
+ BUSINESS
+ SCIENCE
+ ART

ROBIC + DROIT
+ AFFAIRES
+ SCIENCES
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