Copyright: What you need to know for your Business!

In my last three columns, I have examined trademarks in a number of different contexts. In my next few columns, I will examine four other distinct forms of intellectual property: (1) copyright, (2) industrial designs, (3) trade secrets and (4) patents. Although these forms of intellectual property can overlap in some instances, each form protects a distinct set of rights and privileges. First, I will tackle the sometimes controversial subject of copyright.

Copyright is probably the most common form of intellectual property. Virtually all businesses will routinely create and use works that are protected by copyright. For instance, copyright will protect:

- the graphics used in advertising material, including some trade-marks;
- the text and photographs used on web sites; and
- the computer software used in the operation of the business.[1]

To effectively manage copyright as a business owner, it is important to understand when copyright arises and who is entitled to exercise the legal rights associated with copyright.

Copyright Defined

Copyright protected "works" include original works in virtually all fixed forms of expression, such as paintings, computer graphics, sculptures, musical recordings, films, books, software, academic papers, photographs and newspaper articles (like this one).

On the other hand, copyright does not protect ideas, information or concepts. Copyright protects only the specific expression of an idea. Ideas themselves are considered part of the public domain unless protected by a patent or trade secret. Further, copyright in the design of "useful articles" (like furniture, wallpaper, carpets and motor vehicles) becomes unenforceable after the design is reproduced more than 50 times by an industrial process. Instead, an industrial design registration must be sought within one year after the design is made available to the public.[2]

Like other forms of intellectual property, copyright is an intangible right. The person who owns a painting, sculpture, video or book does not necessarily own copyright in that work (even if they own the original and only copy of the work). The owner of the physical object in which the work is embodied may sell, relocate or even destroy the object without infringing copyright. However, they cannot, for instance, make copies unless they also acquire copyright in the work.

Copyright protection arises automatically by operation of law whenever an "original work" is created. Registration is available, but not required. Similarly, marking the work with a

[1] Generally, a business is required to have a license for each copy of any software that it installs.

[2] I will explain industrial designs more thoroughly in a future article.

copyright notice is recommended, but not required.

Essentially, copyright prohibits the "reproduction or distribution" of a work (or any substantial part of it) without the authorization of the copyright owner. This is more than a simple prohibition against "copying" the work. It also prohibits the broadcast, performance, rental, recording, translation and adaptation of the work into another form.

Although there are exceptions, the general rule is that copyright in a work expires when the author has been dead for more than 50 years. At that point, the work is considered part of the public domain and may be exploited without concern for copyright or moral rights. For instance, the works of Shakespeare and Mozart are part of the public domain. However, a film of a Shakespearean play will enjoy its own copyright protection as a cinematographic work if made less than 50 years ago.

Authors vs. Owners

There is (and always will be) an inherent tension between the authors and the owners of copyright. Although it is a popular conception that copyright is intended to protect authors, the reality is very different.

In fact, Canadian copyright law is largely based on law originally developed in Britain which evolved out of censorship activities by the Crown. Essentially, the Crown licensed the operation of printing presses and monitored their activities in an attempt to suppress the publication of seditious and otherwise undesirable works. In this process, the government granted exclusive rights to certain publishers to print certain books. This became known as the "copyright" of the publishers.[3]

In other words, our copyright law originally evolved out of an effort to protect the rights of publishers to copy certain works without much regard for the authors of the works. Many would argue that it continues to do so.

In any event, Canadian copyright law continues to distinguish between the "author" and the "first owner" of copyright in a work. In law, these parties enjoy very different rights and privileges. For business owners, it is important to appreciate these differences.

Who is an Author?

The "author" of a work is the person who actually wrote, drew or composed the work. In some circumstances, a work may have more than one author.

Where it is not clear, the author will be the person or persons who exercised the "skill and judgment" that resulted in the expression of the work in a material form. An author does NOT include a person who merely conceives of an idea that later inspires others to create a work. Generally speaking, an author is directly involved in the creation of the work.

The author of a work enjoys "moral rights" with respect to that work. Moral rights are exclusive to the author and include:

- the right to protect the work from modification;
- the right to protect the work from

[3] It is my understanding that in the French legal tradition, copyright had a very different evolution where it is known as "le droit d'auteur" (the right of the author).

being used in association with a product, service, cause or institution, and
- the right to be identified as the author of the work or to remain anonymous.

Moral rights may be exercised by the author even after the work itself and/or copyright in the work has been sold to another party. In fact, moral rights cannot be sold by the author. They can only be waived.

Who is the First Owner?
The "first owner" of a work is the person or corporate entity that enjoyed legal title to the work when it was created. In the absence of an agreement to the contrary, the general rule is that the author will be the first owner of copyright as well. However, there are significant exceptions.

In the absence of an agreement to the contrary, the author is NOT the first owner of copyright in:
- works made in the course of employment: instead the first owner is the employer;
- photographs, engravings and portraits: instead the first owner is either:
  - the person who ordered and paid for the photograph, if it was so ordered; or
  - the person who owned the original negative or the photograph itself where there is no negative;[4]
- works created by or for the Crown: instead the first owner is ``Her Majesty``.

Beware the Independent Contractor!
It is important that businesses ensure that they have legal title or a valid license for copyright in the works they use every day. Unfortunately, works are often created for a business by independent contractors without consideration of:
- who owns copyright in the works; and
- whether the author should continue to have moral rights over how the works are used in the future.

This can become a legal problem, sometimes even years later.

Independent contractors are NOT employees. So, in the absence of a written agreement to the contrary, independent contractors retain ownership of copyright in the works created by them for others. By exercising their moral rights, they may also be able to prevent the modification of their original work. This remains true even after they've been paid for their services.

Of course, there may be implied limits on how an independent contractor may "re-use" a work originally created for one client. However, in some circumstances, an independent contractor may be entitled to license copyright in the same work to another business, sometimes even to a competitor of the original client.

To prevent such an outcome, it is recommended that businesses require written agreements from any independent contractor engaged to create copyright

[4] If recently introduced amendments of the *Copyright Act* are passed, the exceptions related to photographs will be removed.

protected works for the business. In the agreement, the independent contractor should:

- explicitly sell copyright in the works to the business; and
- waive their moral rights in these works in favour of the business.

In appropriate circumstances, clauses to this effect can even be incorporated into purchase orders and standard form agreements used by a business.

Fair Dealing

In Canada, there are a few "fair dealing" exemptions available for specific purposes, including:

- research or private study;
- criticism or review;
- news reporting; or
- recitation in public.

Generally, these fair dealing exemptions permit the reproduction of limited extracts from a work or the making of one copy of the work for reference purposes. Other specific exemptions are available in the *Copyright Act* for schools, libraries, archives, etc.

Contrary to popular conception, there is no other general right to "deal fairly" with a work in Canada for unspecified purposes. All the available exemptions are for specific purposes and are set out in the *Copyright Act*. There are no implied or "common law" exemptions.

Proposed Amendments to the *Copyright Act*

On June 12, 2008, the federal government introduced a bill to the House of Commons in which it proposes to make wide-ranging amendments to the *Copyright Act*. The introduction of this bill has been anticipated for some time and has been the subject of much criticism, especially from consumer groups. With Parliament about to recess for the summer, further legislative developments are not expected until the fall of 2008 at the earliest. Nevertheless, the proposed amendments deserve some attention.

Many of the proposed changes seek to address challenges that have arisen from the Internet and digital technologies. The most significant amendments seek:

- to clarify that both uploading and downloading an unauthorized copy of a work from the Internet constitutes copyright infringement;
- to formally require internet service providers (ISP's) to pass on copyright infringement notices to their subscribers and to retain information that will identify those subscribers; and
- to introduce prohibitions against the circumvention of "digital locks" used by copyright owners to control access to the digital copy of a work.

The primary criticism from consumer groups is that the proposed amendments seek to significantly increase protection for copyright owners without any corresponding increase in protection for the rights of consumers. In particular, there is no clear means for consumers to exercise their already limited "fair dealing" rights without violating the prohibition against circumventing "digital locks".

Conclusion

By virtue of its pervasive nature, copyright will affect virtually all businesses one way or another. Unfortunately, copyright infringement is also common and copyright owners are becoming increasingly intolerant.

In fact, the recently proposed amendments to the *Copyright Act* have been largely driven by the frustrations of "Big Business" which is intent on protecting their copyright in Canada.

To ensure that copyright does is not the "Achilles Heel" of your business, it is time to become much more vigilant in protecting your own rights and ensuring that you respect the rights of others.

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