

Copyright & Copyleft

- Tips and Traps for Copyright and Licensing

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“Only one thing is impossible for God: to find any sense in any copyright law on the planet”

- Mark Twain

“A day is coming when, in the eye of the law, literary property will be as sacred as whisky, or any other of the necessaries of life”

- Mark Twain

DISCLAIMER

- A very general overview of only selected topics and issues in a large and complex field
- Not to be relied on as legal or business advice
- Viewing these slides or hearing the accompanying presentation does not make you my client
- These slides are subject to copyright © 2015

I said these slides are ©

What does that mean?

Copyright

- Copyright is the right to copy
- Includes some other rights as well – a bundle of exclusive rights
- Subject to “users’ rights” (called “fair dealing”)
- A bargain between creators/developers/authors and society
- Rights under a statute, an Act of Parliament
 - *Copyright Act, Canada*

Copyright

- No common law copyright
- Exclusive federal jurisdiction – national law, across Canada
- International treaties
 - Most countries have ratified
 - We must treat others as we treat ourselves – so a Canadian in the US gets the protection of US copyright law, and an American in Canada gets the same protection as Canadians

Copyright

- Protects the right to *copy* (and related rights)
- Does not protect ideas or information, but the *expression* of those ideas or information
- Copyright law does not protect the idea of giving a presentation on copyright law
- But it does protect this slideshow, and any accompanying remarks today if they were somehow taped or reduced to tangible form

Copyright

Requirements for protection:

1. Originality
2. Fixation
3. Connection with Canada

Copyright - Existence

- Exists automatically - protection is ***automatic*** upon fixation
- Registration is available:
 - but not required for copyright to exist
 - creates a presumption of validity in litigation
 - onus of proof is on person disputing the register
 - no time limit on registration, but last minute registrations before suing may not be given full effect by the courts

Copyright - Existence

- Must emanate from a (human) author
 - Machine created works are problematic
 - Elephants don't own copyright
- Term in Canada = Life of the author, plus 50 years following the year of the death of the author
- Performers, Record Producers, Broadcasters, etc. – flat 50 years

Copyright - Originality

- Only original work is protected
 - Must originate with author(s)
 - Must not be a copy of another work
 - Must be the product of an author's exercise of some skill and judgment – not so trivial as to be a purely mechanical exercise
 - Creativity is not required to make a work original
 - Quality not essential, so GARBAGE© is possible

Copyright - What is Protected?

- Literary Works
- Artistic Works
- Dramatic Works
- Musical Works
- Sound and Video Recordings and Performances and Broadcasts (if fixed)
- Cinematographic Works
- Compilations

Copyright - What is Protected?

- Compilations:
 - A work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or parts thereof
 - Many computer programs are compilations
 - A website can be too
 - A work resulting from the selection or arrangement of data

Copyright - What is **NOT** Protected?

- Ideas
- Facts
- Data (if raw, but if processed using human intellect, it may be)
- Works where the copyright has expired (public domain)

Copyright Example – a Book

- You buy a book (a literary work) - you can:
 - Read it
 - Burn it
 - Throw it away (or bird-cage it)
 - Shred it
 - Give it a friend (let's face it, loans of books are really gifts)
 - Donate it

- But you can't copy it!

Copyright Example – a Painting

- You buy a painting (an artistic work) - you can:
 - Look at it
 - Hang it in your home
 - Keep it in the attic or basement
 - Throw it away
 - Give it a friend
 - Donate it

- But you can't copy it!
- And, you can't hang it for display in public (*unless it's for sale*)

Copyright - Who owns it?

- The “author” (human who creates)
- Employees
 - The employer will generally own copyright in works created by employees within the scope of their employment
- Independent Contractors/Freelancers
 - The contractor will own copyright in works they create

Moral Rights

- In addition to Copyright
- Cannot be assigned or transferred, but can be waived
- Applies to authors who may no longer retain the copyright (e.g. if assigned)
- Often overlooked

Moral Rights

- Attribution (including anonymity)
- Integrity
 - stops distortion, mutilation or other modifying of the work if it prejudices the author's honour or reputation
- Association
 - the author may control the use of the work in association with a product, service, cause or institution where it prejudices the author's honour or reputation

Copyright - Who owns it?

- Title transfers and assignments:
 - **Must be written**
- Exclusive licenses:
 - **Must be written**
- Non-exclusive licenses/waivers
 - Need not be written (perhaps)

Copyright - Infringement

- Infringement is defined as doing anything which only the holder of the Copyright has the right to do.
- Copyright holder has rights:
 - to reproduce, copy
 - first public distribution
 - Public performance or exhibition, rental (in some cases)
 - Subsidiary Rights - abridgement, translation, novelization, movie adaptation, dramatization

License

- A license is permission allowing you to do something that otherwise would be illegal
- A license is a contract
- A license may be:
 - Exclusive (just you, and not even me)
 - Sole (just me and you)
 - Non-exclusive (just me and anyone else I like)
 - Limited in time
 - Limited in location
 - Limited in “field of use” or permitted application(s)
 - Limited only by your imagination

Copyright - Infringement

- Happens if you don't get a license
- Must be substantial taking or copying
- Knowledge is generally irrelevant
- Two elements to infringement:
 - Access
 - Substantial similarity

“I was never ruined but twice – once when I lost a lawsuit, once when I won one”

- Voltaire

Users' Rights

- The copyright bargain
- Some rights granted to the public at large as part of the bargain
- We call these rights fair dealing
- In the US – fair use

Amendments to the *Copyright Act*

- **Fair dealing** expanded to now include:
 - Education
 - Satire
 - Parody
 - Research
 - Private study
 - Criticism or review and news reporting (requires credit to the source)
 - Mashups (provided no commercial effect on the market)
 - Time shifting
 - Format changing
 - Copying for private purposes

When you steal from one
person, it's plagiarism;

when you steal from many,
it's research

Amendments to the *Copyright Act*

- Prohibits circumvention of digital locks with limited exceptions (e.g. unlocking cell phones)
- Limits statutory damages for non-commercial infringement to \$100 - \$5000 for all works in one case (for commercial infringement the range is \$500 - \$20,000 per work infringed)
- Notice and notice – ISP must forward notices of infringement to account holders

“Works”

- Blogs, if original, will be protected as literary works
- Software, if original, is a literary work
 - Subject to fairly elaborate analysis
 - Subject to “scenes a faire” – ideas with limited ways to express
 - Software of any kind, including source code, object code, plug-in’s, API’s, etc.
- Logos, designs, graphics, photos, images will be artistic works
- Videos and animations either cinematographic works, dramatic works, or artistic works, or a compilation

“Works”

- The whole web is either content or code, so.....

Open Source

- Copyleft, Creative Commons, Open Source
- Still subject to copyright and some kind of license
- Use may require you to transfer improvements back into the pool
- Use may require attribution
- Note that many licenses are subject to the laws of foreign jurisdictions – you may be surprised what you have agreed to

Copyright Tips and Traps

■ Trap

- I don't need a written agreement to become the owner of a copyright created/authored by someone else who is not my employee.

■ Tip

- WRONG!
- Any proprietary interest must be transferred in writing, and that includes ownership and an exclusive license
- Without writing, the best you get is an implied non-exclusive license

Copyright Tips and Traps

■ Trap

- It's freely available online, so I can just use it, right?

■ Tip

- Not so fast. You probably need a license, or to comply with certain conditions.
- You may also be using something that is digitally watermarked and/or searchable – That can be expensive

Copyright Tips and Traps

▪ **Trap**

- I paid the developer for my [website, software, plug-in, blog, tweet, API]. I own it, right?

▪ **Tip**

- Not so fast.
- If the developer is your employee and it was their job, yes.
- If the developer is an independent contractor, NO! (unless you have an assignment in writing)

Copyright Tips and Traps

■ Trap

- OK, maybe I don't own it, but I still paid the developer for it, so only I can use it, right?

■ Tip

- Not so fast.
- If the developer is (was) your employee and it was their job, you own it and can exclude anyone
- If the developer is an independent contractor, NO! (unless you have an exclusive license in writing)

Copyright Tips and Traps

■ Trap

- I am the CEO of an exciting start-up, and a bunch of VC's from the Valley want to make me rich. I don't need to worry about those developers who left the company 2 years ago.

■ Tip

- Hmmmm, maybe.
- Do you have sufficient written agreements with all of them?
- If not, you may not be funded
- Buying IP rights after the fact can be expensive
- Chain of title is key

Copyright Tips and Traps

■ Trap

- Chain of title? What the *#!@ is this, CSI?

■ Tip

- Close, but not quite CSI
- If A develops a plugin and assigns it to B in writing, who then assigns it to C, who assigns it to D, who then assigns it to you, you must have a copy of each transfer or the chain will be broken and you may not be able to prove title

Copyright Tips and Traps

- **Trap**

- I have NDA's with all my developers. I don't need to worry, right?

- **Tip**

- Hmmmm, maybe.
- NDA's prevent disclosure of confidential information, and may restrict use of it. An NDA may or may not deal with IP rights.

Copyright Tips and Traps

■ Trap

- I have built some cool software using a mixture of open source code and my own stuff. I can just sell it or license it freely, right?

■ Tip

- Probably not. It depends on the terms of the open source license.
- Some customers of developers will require warranties that no open source code was used.

Copyright Tips and Traps

■ Trap

- I have built some cool software but I have not disclosed it or published it. I see someone out there is using something that is identical or close to identical. I can sue them for infringement, right?

■ Tip

- No
- It may be similar or identical, but if you have never published, they cannot have had access to it. Without access, there is no infringement.

Copyright Tips and Traps

■ Trap

- I have a great idea for a website. I told some friends about it, and now they have stolen my idea and are building my website! I can sue them for copyright infringement, right?

■ Tip

- No
- Copyright does not protect your idea. It protects the way in which someone expresses it.
- Unfriend your friends, and (possibly) sue them for breach of confidence

Copyright Tips and Traps

■ Trap

- OK, I listened to everything you said, and I have written assignments from all developers. I own the copyrights free and clear, with no worries, right?

■ Tip

- Maybe not the way you think. Did you get a waiver of moral rights?
- Moral rights cannot be transferred or assigned. They can only be waived. If not waived, they can be a pain. Just ask the Eaton Centre about the Canada Geese fiasco.

Copyright Tips and Traps

- The Canada geese fiasco?
 - Yes, in the Eaton Centre in Toronto.
 - Sculptures of geese hanging from the rafters
 - Public exhibition right purchased from the sculptor
 - Gaily festooned necks with red ribbons for Christmas
 - No waiver of moral rights

QUESTIONS?

Thank you!

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