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.
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?

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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