

SOFTWARE LICENSING AND DEVELOPMENT: A CASE STUDY

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Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2011 FC 340

This recent decision provides a good case study on software development, licensing and copyright issues. This is a lawsuit about copyright in certain software computer programs. Harmony Consulting Ltd. (“Harmony”) claimed that it was the owner of certain software and sued G.A. Foss Transport Ltd. (“Foss Transport”) and its principals, for copyright infringement.

Software companies can learn some valuable lessons from this case. Perhaps the most important lesson is that software licensing and copyright law is a complex area. The next important point is that well-drafted contracts can prevent or solve a lot of disputes. Lastly, clear employment agreements can help clarify copyright ownership. Here are five points to remember:

1. The court reminded us that computer programming that is dictated by the operating system or reflects common programming practices is not original expression and will not enjoy copyright protection.
2. Remember: an assignment of copyright must be in writing. An assignment in one’s mind is not a valid assignment. In this case, the retroactive written assignment was not accepted by the court.
3. Another important point: Copyright infringement does not arise out of a breach of contract, but is violated only if the infringer does something (such as copying) that only the owner can do within the confines of the *Copyright Act*. For example, exceeding user licenses does not constitute infringement.
4. An infringement of moral rights is not tantamount to an infringement of copyright.
5. In this case, copyright ownership might have been determined differently on the employment issue – in other words, a different court might have decided that Mr. Chari was never formally an employee of either of his companies, so he maintained ownership himself. In which case, the entire case would have fallen on that point.

Here, the software program in dispute was based on the Microsoft Access platform, which contains a “design view” to view code. In the court’s opinion, using “design view” simply allows a user to see the objects and programming. As the court said, there is no copyright infringement in looking at the programming. However, the result might have been much different in the case of proprietary software that was not based on an off-the-shelf platform such as Microsoft Access.

For more updates on the law of software licensing, visit ipblog.ca.

For advice on software licensing and copyright protection, contact our **Intellectual Property and Technology Group**. ▲

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

WWW.FIELDLAW.COM

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Calgary 403-260-8500
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