WHO OWNS AN IDEA?

"Who owns an idea? Who owns the manifestation of that idea? What if that person is an employee? What if that employee comes up with the idea during company time? What if it's during off-hours? What if he or she is an independent contractor?"

Steve Eichler

What is Copyright?

Any exploration of who owns ideas, or rather, the manifestations of them involves a rudimentary understanding of copyright. Copyright is the term given to encompass all rights flowing from the ownership of intellectual property associated with a "work". It applies not to an idea, but to the manifestation of it. It is an exclusive concept—only the copyright holder may do or authorize others to do things with the work that the *Copyright Act* allows. As this implies, copyright may be divided so that some of the rights may be parcelled and dealt with separately. (An example of this is a licensing agreement whereby the right to distribute a musical work in a specified geographical region is granted to another person or company). The work over which copyright exists must be an original work and not a mere copy of another's work. While there are criteria for copyright to exist, it is inherent in the work—so long as the criteria are met, copyright exists as soon as the work is made. No further act on the part of the author is needed and no registration is necessary, though proof of the creation of the copyright is recommended as proof of establishing copyright ownership.

Copyright Ownership: Three Elements

With respect to ownership of copyright, the general rule is that the author of the work is the first owner of the copyright. However, pursuant to section 13.3 of the *Copyright Act*, when an individual is in the employment of another and the work in question is made during the course of that employment, the copyright belongs to the employer, absent an agreement to the contrary. Thus there are three immediate considerations: Is the individual an employee (employed pursuant to a "contract of services") or an independent contractor (pursuant to a "contract for services")? Secondly, if the individual is an employee, was the work made in the course of employment of the author? This is a determination of the facts whereby the court would examine the terms of employment, including the hours of employment. Lastly, there must not be any agreement as between the employer and the employee vesting the ownership of copyright in the employee.

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An interesting example of the first two elements is found in the case of *Hawley* v*. Canada.* There, the plaintiff was an inmate who obtained permission to paint a mural in the dining room of the institution as part of his mandatory work assignment. When the plaintiff left the institution he claimed ownership of the painting and brought an action for such a declaration and for damages. The trial judge found that the plaintiff had not made out his case for three essential reasons: a) the painting was done as part of his required gainful employment; b) the purchase of the supplies and materials was consistent with the carrying out of the assignment to do the work on behalf of the institution; c) it would have been inconsistent with the policies of the institution to give the plaintiff free scope in any artistic endeavour at the end of which the product would be his. In reaching this conclusion, the trial judge considered the principal factors that differentiate an employee from an independent contractor:

a) ownership of tools;

b) control or direction (relationship of subordination);

c) risk of loss or chance of profit;

d) degree of integration of the worker into the workings of the enterprise.

With respect to the issue of an agreement between the employer and the employee vesting the ownership of copyright in the employee, it has been recognized that the ability to bargain for ownership of copyright is a key aspect of economic rights flowing from creation of a work. Indeed, the fact that copyright can be assigned is strong indication of Parliament's intention to allow creators to attempt to reap whatever economic benefits they could from the creation of their work. It is important to note however that any such agreement must be in writing.

Conclusion

By and large, the author of a work is the owner of the copyright of that work. However, where that author was employed for the purpose of creating the work—a programmer working for a computer company, for example—it is the employer who is the owner. While this is an apparently straightforward concept, it involves an investigation into the details of employment to determine whether the relationship is truly an employment one, as opposed to one with an independent contractor. If there is any doubt, specific language should be included in any hiring documentation to clarify the situation. Further, since copyright can be assigned, consideration should be given to inserting an assignment of copyright in such documentation.