

Am I Original?

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This article is for businesses which create “Works” flowing out of “The Original Six”; that is, Works expressing *“curiosity, imagination, creativity, intelligence, genius or talent”*.

All of these “Original Six Works” involve copyright. This article summarizes the key copyright elements required to properly own, publish and exploit valuable Works.

What is copyright?

Copyright is a bundle of exclusive rights being: the right to reproduce the Work (this is the one most often used), the right to create adaptations of the Work, the right to distribute copies of the Work, the right to publicly perform the Work, the right to publically display the Work and the right to digitally perform sound recordings.

For a Work to receive the numerous benefits copyright offers creators, all of the following must be present: the Work must be original;
the Work must be substantially completed; the Work must be captured.

What is originality?

The legal test for originality varies from country to country. In the CCH case (2004), the Supreme Court of Canada determined that for a Work to be original, it *“is one that originates from an author and is not copied from another work ... In addition, an original work must be the product of an authors exercise of skill and judgment ... While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”*”. The Court then carried on to define *skill* as *“the use of one’s own knowledge developed by practise”*, with *judgment* defined as *“the use of one’s capacity to form an opinion and evaluate different results”*.

Because the tests for copyright in the United States and Europe are different, and more stringent, a “Work” created and copyrightable in Canada might not be entitled to copyright protection if distributed in either the United States or Europe.

Substantial Completion

The second requirement for copyright is that the Work must be *substantially completed*. Only the author can determine when the Work is substantially completed. In order to establish copyright, the author should substantially complete the Work, and create a record of that Work, complete with date, so as to establish a basis for a claim to copyright. Iterative improvements to the Work in certain cases can date back to the first date of substantial completion.

Capture

The third requirement for copyright is that the Work must be *captured*. To achieve capture, the Work must be recorded in some permanent, physical and reproducible medium, such as a computer disk, paper or other tangible format. The author should always be careful just who, or what it is, that is doing the capturing. I often ask students the question “who owns copyright in the notes you are taking of my speech to you?” Because the students are “capturing” my words and writing down their summary of them in their own ways, the students will own copyright on those notes. In a business setting, this result also demonstrates the need for confidentiality when material is presented to others.

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Types of Protection

Copyright protection extends to a wide range of Works. There are four categories for copyright protection in Canada: literary; music; dramatic; and artistic.

The application of these four categories is very broad. The literary category includes software and examples of the other categories would be such things as motion pictures, newspapers and periodicals, websites (but not domain names), fine arts such as photography, sculptures and paintings, greeting cards, post cards, stationary, advertising and publicity materials, novels, plays, poetry, blueprints, works of architecture and of course music works, dramatic works and choreography works.

Ownership of Copyright

Authorship of copyright is distinct from ownership of copyright. The general rule is the individual who creates or authors the Work is the first legal owner. The main exception to this rule is in an employee situation. Where the Work was created in the course of employment, the employer will be the owner of the copyright. Whoever the initial owner is, copyright can always be transferred. This is a very important point to always consider because ownership can carry with it the ability to reproduce the Work.

Duration of Copyright

Where there is one author of a Work, the term for which copyright subsists is the life of the author and a period of fifty years after the author's death. The duration of copyright where there are multiple authors is more complex.

In our next Intellectual Property article, we will be reviewing the use of others "quotes or information" in your Works (Am I Still Original?) and the risks connected with co-authoring a Work.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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