



BENNETT JONES

LLP

Copyright and Family Histories

Alberta Family Histories Society

First Christian Reformed Church, 3818 - 14A Street SW, Calgary

February 5, 2007

Martin P.J. Kratz

Bennett Jones LLP



Copyright Introduction

- **Basic introduction to law to assist in understanding how to address common questions**
- What is copyright?
- Who owns a copyright?
- What can be copyrighted in genealogy?
- How does one protect against others copying one's work?
- Does placing a copyright notice on your work matter?



Copyright Introduction

- Copyright arises from the creation of an original work that is the product of skill and judgment and which is fixed in a tangible form
 - Minimal formalities
- **Original** – means originating from the author, no novelty is required
- **Fixation** – recorded on paper, disk, other recoverable means
- **Level of creativity** – is low – routine documents that show some level of thinking may be protected
 - random numbers, blank forms, reports



Copyright Introduction

History of Copyright

- 1700s law of England – informs US concepts
- Late 1800s England adopts European model – Berne Convention
- *Imperial Copyright Act* > Canada, commonwealth members
- Early 1900s, the US and Berne Convention
- Post WWII era – Universal Copyright Convention
- Late 1900s – US joins Berne Convention



Copyright Introduction

Term of Copyright

- For most works – life of the author plus the end of the year in which the author dies, plus 50 years

Notices

- Copyright notices are not necessary to create the right, but can be very useful
 - © 2007 Martin Kratz – UCC form of notice
 - Claim under international treaties
 - Create rebuttable presumptions

Registration

- Copyright registration is not necessary to create the right, but important for assignments or transfers of rights
 - Create rebuttable presumptions of existence of the rights, owner



Copyright Introduction

- **Intangible rights**

- Confusion between the “thing” and the copyright
 - article, manuscript, photograph
 - copyright
- Must consider both

- **Protects form of expression, not ideas**

- “Facts”, “history” and basic data
- Information *per se* is not protectable
 - Public policy favours free exchange of ideas
- Form in which ideas are expressed may be protectable



Copyright Ownership

- **Ownership of copyright is a common problem in a system of automatic creation of rights**
- **Basic rules:** Courts will enforce an agreement dealing specifically with ownership of copyright
- If no agreement:
 1. Author is the first owner of the copyright
 2. Exception if (a) employee and (b) work in the scope of employment – then employer is owner; and
 3. Exception if painting, engraving or portrait commissioned for value, and paid – commissioner is first owner



Other Rights Close to Copyright

- Special kinds of rights close to copyright are called Neighboring Rights
 - Rights of performers who perform a musical work – rights in the performance
 - Rights of broadcasters in a communication signal
 - Rights of makers of sound recordings in the disk or other form of recording
- Moral rights of authors of any copyright work
 - to integrity of the work
 - to claim paternity of the work



A Copyright Includes Many Rights

- **Copyright is a bundle of rights**
 - Reproduction
 - Publication
 - Performance
 - Transmission to the public
 - Adaptation
- **Authorizing such conduct**



Collecting History

- **Anglo- Canadian approach**
 - Sweat of the Brow (Industrious Effort)
- **US approach**
 - Require substantive creativity
 - *Feist* (US SC)
- ***Tele-direct* (FCA) – Need for creative input**
 - Old Canadian test: Labour, Skill and Judgment
 - Sweat of the Brow is gone
 - But no alternative remedy for unfair competition
- **What does the *Copyright Act* say?**



Collecting History - Databases

- **Compilations – S. 2**

“compilation” means

- (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof; or
- (b) a work resulting from the selection or arrangement of data”



Collecting History - Databases

- ***CCH Canadian v. LSUC* (S.C.C.)**
- **No requirement of creative spark**
- **Originality is based on traditional test**
 - but not mere labour, or mechanical exercise
 - overturns *Tele-direct* on this point
- **Key is originality in the selection and arrangement**
 - layout
- **Case dealt with factual information**
 - Differentiate data element from compilation



Collecting History - Databases

- **Consider copyright in data elements and in the compilation / database**
- **Contributor of data elements would typically retain their rights in such data**
 - Watch contractual terms of submission
- **Claim of copyright in the compilation is made by the person responsible for the selection and arrangement – design of the compilation**



Enforcement of Copyrights

- **Civil Action**

- Responsibility of copyright owner

- **Civil remedies**

- direct infringement
- contributory infringement
- vicarious liability

- **Types of remedies**

- compensatory damages
- statutory damages
- punitive damages
- accounting of profits
- seizure of infringing goods



Enforcement of Copyright

- **Criminal Prosecution**

- *Criminal Code*
- *Copyright Act*
- For very serious cases
- Typically sale of copyright infringing goods or widespread distribution of copyright infringing materials
 - Commercially competitive activity



Defenses

- **Consent**

- Express (License)

- Implied

- **Term has Expired**

- **Non-Substantial Taking**

- **Taking only non-copyright matter**

- **Exemptions (“User’s Rights”)**



Consent

- **Express terms regarding use of a book, web site or other content**
 - Is it legally effective?
 - Clarity of terms
 - Communication of terms
 - Affirmative or passive
- **Considerations on copyright cautions**
 - Overreaching prohibitions?
 - Limitations on uses
 - Permissions and terms for use



Consent

- **Other Sources of Consent**
- **Role of collectives**
 - Cancopy
 - Socan
 - CMRRA
- **Statutory Consent – S. 77**
 - unlocatable copyright owner
- **Getting Consent**
 - Document the permission



Documenting the Consent

- **Can give / obtain permission to copy or use other rights of the copyright owner – called a license**
- **License should be in writing to avoid dispute or misunderstanding**
- **Key terms:**
 - Term
 - Territory
 - Scope of permission (use, application, etc.)
 - Payment or other terms (attribution, etc.)
 - Representations, warranties, indemnities, limits on liability



Key Exemptions (“Users Rights”)

- **Balance of creators rights vs. users rights**
- **Fair Dealing (Canada)**
 - Private Study or Research – S. 29
 - Criticism or Review – S. 29.1
 - News Reporting – S. 29.2
- **Must show both “fair dealing” and the permitted purpose**
 - Must consider what is “fair”
- **“research” – given a large and liberal interpretation**
 - not limited to non-commercial or private context



Fair Dealing (Canada)

- *CCH Canadian v. LSUC* (S.C.C.)
- “Fair dealing” is a user’s right – must not be interpreted restrictively
- **Factors that may be considered to determine if the dealing is “fair”**
 - Question of degree
 - purpose of the dealing
 - character of the dealing
 - amount of the dealing
 - alternatives to the dealing
 - nature of the work
 - effect of the dealing on the work



US Key Exemption

- ***Fair Use* (U.S.) Factors 17 U.S.C. § 107, guide a court's fair use determination.**
- **(1) the purpose and character of the use;**
- **(2) the nature of the copyrighted work;**
- **(3) the "amount and substantiality of the portion used" in relation to the work as a whole; and**
- **(4) the effect of the use upon the potential market for the work or the value of the work.**



Special Exemptions

- **Educational Institutions (non-profit)**
 - Instruction S. 29.4(1), Examination, S. 29.4(2)
 - Performances, S. 29.5
 - News and Commentary, S. 29.6
 - Reproduction of Broadcasts, S. 29.7
- **Literary Collections, S. 30**
- **Libraries, Archives and Museums, S. 30.1**
- **Educational institution photocopiers, S. 30.3**
- **Copying sound recordings for private use – S. 80(1)**
 - But not for distribution – S. 80(2)



Special Issues

- **International Issues**
- **US and Canadian law differ**
 - term of copyright
 - requirement of “creativity”
 - may be different owners
 - litigation culture of the US
 - on special issues – music copyright
- **Must consider international impact of activity**



Special issues

- **Visiting a Web Site**
- **Browsing and Caching**
 - Reproduction for copyright purposes
 - Implied license?
 - But only if posted by the copyright owner or on his / her authority



Special issues

- **Posting Material to a Web Site**
- **Copyright implications**
 - reproduction
 - publication
- **A person “authorizes” the communication of a work by posting it on a web site**
- **Host servers who host infringing content for download do authorize such infringements**
- **Indifference exhibited by acts of commission or omission may reach a degree that authorization can be inferred**
 - US notice and take down mechanism – *Digital Millennium Copyright Act*
 - Canada’s approach



Seeking to Minimize Misuse of Your Works

- Consider what you are trying to achieve
- Basic problem of the Internet
 - Best protection is not to make it available
- If make available consider a freeware / shareware approach
 - disclaimer + encourage citation
 - Issues:
 - Clarity of terms
 - Commercial uses included?
 - Limited ability to revoke the license



Seeking to Protect Your Works

- **Address ownership of all contributors**
- **Address basis on which all 3rd party content is used**
- **Use copyright notices**
- **Consider registration of copyright**
- **Define terms on which others may be permitted to use the works**
- **Monitor use by others**



Questions?

Martin P.J. Kratz

Bennett Jones LLP

email: kratzm@bennettjones.ca

Phone: (403) 298-3650

Fax: (403) 265-7219

URL: <http://www.bennettjones.ca>