



Copyright

Estate planning and estate administration considerations

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What is copyright?



What is copyright?

*“3 (1) For the purposes of this Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...”*

[Copyright Act, R.S.C., 1985, c.C-42] (the “Act”)

What is copyright?

“3(1) ...copyright... includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

What is copyright?

“3(1) ...copyright... includes the sole right

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

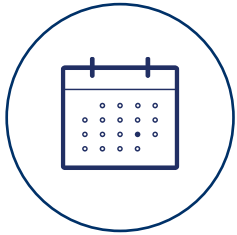
(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner, and to authorize any such acts.”

Duration and assignment of copyright

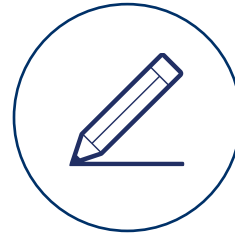


Duration and assignment of copyright



Duration

Section 6 of the Act provides that, except as otherwise expressly provided in the Act, following the death of an author, copyright in the work of an author subsists for the remainder of the calendar year in which the author dies plus **70** years following the end of that calendar year



Assignment of copyright

Subsection 13(4) of the Act provides:

“The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent.”

Limited assignment – Duration/first owner

*“14 (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, **otherwise than by will**, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.”*


(underlining added for reference)

Exception for “collected works” [ss.14(2)]

Transfer of property right



Transfer of property right



“The “grant of an interest” referred to in s. 13(4) is the transfer of a property right as opposed to a permission to do a certain thing.” [Ritchie v. Sawmill Creek Golf & Country Club Ltd., 2004 CanLII 21366 (ON SCDC), per McKinnon, J. at para.20]

“Subsections 13(4) and 13(7) of the Copyright Act deal with the transfer of a property right...”: Tremblay v. Orio Canada Inc., 2013 FCA 225 (CanLII), [2014] 4 FCR 903, per Mainville, J.A. at para.20]

Form of property – transfer by Will

As a result of the combination of ss.13(4) and 14(1) of the *Copyright Act*, an individual is entitled to transfer copyright by a written and signed Will {see *Wing v. Velthuisen*, 2000 CanLII 16609 (FC)) at para.45} (“Wing”).

In *Regina v. Stewart* (1983) 42 O.R. (2d) 225 (Ont.C.A.), Cory J. stated that “*Copyright is a form of property analogous to personal property. It may be sold or transferred by will.*”

Incorporeal property [see *In Mansell v. Valley Printing Co.*, [1908] 77 L.J. Ch.D. 742 at 744 per Cozens-Hardy M.R. quoted in *Underwriters’ Survey Bureau Ltd. V. Massie & Renwick Ltd.* [1938] Ex.C.R. 103]

Where Will is silent as to copyright: “...it appears that a copyright which is not mentioned in the will passes under the gift of residue to the residuary legatees.” (*Wing*, at para.47, per Nadon, J.)

Assent and assignment/transfer

What if the estate has not been fully administered?

- as with all forms of property forming part of deceased's estate, until personal representative "assents" to copyright belonging to beneficiary, legal title rests with personal representative
- transfer of copyright may be accomplished by form of deed of assignment/transfer to evidence that copyright (being an incorporeal interest) has been transferred to beneficiary



Does gift of work alone also transfer copyright?



- It is important to realize that gift of the work itself, without mention of copyright interest therein, does not necessarily result in beneficiary receiving copyright
- Beneficiary will merely become owner of the work with no right necessarily to grant permission to copy it (unless of course the beneficiary is also sole residuary beneficiary)
- As stated by Duff C.J. in the Supreme Court of Canada decision in *Massie & Renwick v. Underwriters' Survey Bureau Ltd., supra*,: “It is clearly settled now, by the authority of *In re Dickens* [[1935] Ch. D. 267.] that the author, in transferring the property in his manuscript, does not thereby necessarily assign the incorporeal right.”
- The implication is that a testator or testatrix should **expressly** provide for gift of copyright if it is intended to belong to a beneficiary who is to receive the works of testator or testatrix and who is not sole beneficiary under the Will

Moral rights



Moral rights

- Moral rights: *“The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”* ss. 14.1(1) of the Act
- Subsection 14.2(1) of the Act provides that “moral rights” in respect of a work subsist for the same term as the copyright in the work.
- According to ss.14.1(2) of the Act, moral rights may not be assigned, but can be waived in whole or part [but see ss.14.2(2) re: bequeathment]



Moral rights

- Subsections 14.2(2), 14.2(3) set out succession to moral rights:
- **14.2(2)** *The moral rights in respect of a work pass, on the death of its author, to*
 - **(a)** *the person to whom those rights are specifically bequeathed;*
 - **(b)** *where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or*
 - **(c)** *where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate.*
- **(3)** *Subsection (2) applies, with such modifications as the circumstances require, on the death of any person who holds moral rights.”*
- Arguable that since Act provides for succession to moral rights, transfer of moral rights not dependent on any express act of deceased’s personal representative with respect to moral rights.



Moral rights



- In other words, moral rights pass by operation of statute to persons so entitled and therefore outside of any Will (although technically if deceased bequeaths his or her moral rights by Will, Will acts as “designation” of beneficiary of those moral rights)
- “Assent” by personal representative to a transfer of moral rights to beneficial owners may not therefore be relevant
- Issue of moral rights should also be considered in estate planning of any individual where moral rights may be relevant and moral rights should also be considered in estate administration of any such person

Considerations



Considerations

- ☐ Make a Will!
- ☐ Special Executor/Trustee? (especially if ongoing licensing/publishing agreements, royalties)
- ☐ Assigning/transferring copyright and royalty interests to Corporation
- ☐ Transferring shares of Corporation to a Trust
- ☐ Tax considerations
- ☐ Evidencing assignment of copyright to beneficiaries



Thank you

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