COPYRIGHT IN THE DIGITAL WORLD

(INCLUDING A REVIEW OF RELEVANT RECENT AMENDMENTS)

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Copyright Basics

• Copyright law is a form of intellectual property protection that applies to a range of different types of works including computer software and data bases. Other intellectual property laws such as those that apply to patents, trade-marks, etc. also exist

• Copyright laws are national in scope – there is no international copyright law
  – There are international copyright treaties that harmonize laws across different countries
Copyright Basics (Cont’d)

• Copyright exists upon creation and there is no requirement to register one’s copyright in Canada although a registration system does exist.

• For a work to be afforded copyright protection, it must be both “original” and “fixed” and fit into a prescribed category as per the legislation.

• An author of a copyrighted work is presumed to be the first owner except where he is in a contract of employment in which case the employer is the first owner of copyright in the work.
Copyright Basics (Cont’d)

• Copyright holders have many rights in their works including the right to reproduce the work, translate the work, modify and adapt the work, telecommunicate the work, etc. as well as the right to authorize any of the above

• Copyright is infringed by any person who does with a work that which they are not allowed to do. There are various exceptions to copyright infringement, including the well-known fair dealing exception
Copyright Basics (Cont’d)

- Copyrights may be licensed or assigned (i.e. transferred) to others
- Copyright is a very complicated law with the layering of many rights often coming into play when one wants to use a work even for the most simple of uses such as putting a piece of music up on a web page for users to listen to
Recent Attempts At Copyright Reform

- Canada has attempted to comply with the World Intellectual Property Organization (“WIPO”) treaties and to bring its copyright legislation in line with other industrialized countries

  - **Bill C-60** (2005) - Liberal Government
  - **Bill C-61** (2008) - Conservative Government
  - **Bill C-32** (2010) - Conservative Government
  - **Bill C-11** (2011) – Conservative Government
Copyright In The Digital World
Overview Of Bill C-11

• Technological protection measures
• ISP, search engine and hosting liability
• Statutory damages
• Format shifting and time shifting
• Fair dealing
• Ownership of photographs
Technological Protection Measures

- A **TPM** (“digital lock”) is defined as an effective technology, device or component that, in the ordinary course of its operation, controls access to a work or restricts doing to a work anything which the copyright owner has the exclusive right to do.

- **Explicit prohibitions**
  - Circumventing TPMs
  - Providing services for the purposes of circumventing
  - Manufacturing, importing, distributing, selling or renting circumvention devices
Technological Protection Measures (Cont’d)

• Exceptions
  – Law enforcement and national security
  – Interoperability of computer programs
  – Encryption research
  – Personal information
  – Security
  – Persons with perceptual disabilities
  – Temporary recordings by broadcast undertakings
  – Unlocking wireless devices
  – Prescribed by regulation
ISP, Search Engine And Hosting Liability

- **ISPs** and **search engines** do not infringe copyright when they act strictly as intermediaries in communication, caching and hosting activities for their customers.

- **Hosts** do not infringe copyright when they provide digital memory which another person might use to store an infringing copy of a work.
  - Exception: the person providing digital memory knows of a court decision to the effect that the person storing the work in the digital memory is infringing copyright by making the copy of such work or by the way in which this person is using the work.
Formalized “notice and notice” regime

- **ISPs** and **hosts** must forward electronically any notice of infringement received from copyright owners to the subscriber who is engaging in infringing activities.

- ISPs must retain records that will allow the identity of the subscriber for a period of 6 months from the time of notification, or for a period of 1 year if proceedings are commenced with respect to the infringement. Otherwise, the IPs may be held liable to a fine ranging from $5,000 to $10,000.

- Identity of the subscriber may be released with a court order.
Statutory damages

- **Non-commercial infringement**
  - Statutory damages ranging from $100 up to $5,000 *per legal proceeding*, i.e. for all infringements and all works involved (as opposed to *per work*)
  - “**First to file and elect**” → *collection* of statutory damages limited to the first copyright holder to *file* a proceeding and *elect* for statutory damages
  - **Proportionality** → Damage award limited by hardship suffered by the defendant and lack of knowledge of the infringement

- **Commercial infringement**
  - No change from previous statutory damage regime
  - Statutory damages of no less than $500 and no more than $20,000 *per work infringed*
Format Shifting And Time Shifting

- **Format shifting**: Copies of works of any kind may be transferred from one format to another, as long as the original copy of the work does not infringe copyright, and as long as the individual:
  - Receives the work legally
  - Does not give the reproduction away
  - Uses the reproduction for private purposes
Format Shifting And Time Shifting (Cont’d)

- **Time shifting**: Broadcast television, radio, or Internet programs may be recorded for later viewing, as long as the individual:
  - Receives the program legally
  - Makes no more than one copy
  - Keeps the recording “no longer than necessary in order to listen to or view the program at a more convenient time”
  - Does not give away the recording
  - Uses the recording for private purposes

- TPMs may not be circumvented for these purposes
Fair Dealing

• Fair dealing for the purpose of **education, parody and satire** does not infringe copyright

• **Non-commercial user-generated content** (e.g. mash-ups)
  - Individuals may incorporate existing copyrighted work into new works if:
    • It is solely for a non-commercial purpose;
    • The source of the existing work is mentioned (if it is reasonable to do so);
Fair Dealing (Cont’d)

• The individual has reasonable grounds to believe that the existing work was not infringing copyright; and

• The dissemination of the new work does not have adverse effects on the exploitation or potential exploitation of the existing work or on an existing or potential market for it
Ownership Of Photographs

• Photographers are first owners of copyright in their photographs

• Copyright in photograph protected for 50 years after the death of the photographer

• Individuals who have commissioned a photograph may make personal or non-commercial use of the photos unless otherwise specified by contract
Supreme Court Pentalogy

• **SOCAN v. Bell Canada**
  - **Holding**: Streaming an online music preview for sampling by potential purchasers of a digital download of a musical work is fair dealing.

• **Alberta v. Access Copyright**
  - **Holding**: Copyright Board asked to reconsider its “unreasonable” decision that the photocopying by teachers of textbook excerpts for use by students in schools is not fair dealing.
Supreme Court Pentalogy

- **Entertainment Software Association (ESA) v. SOCAN**
  - **Holding:** Downloading music is not a communication to the public, as this transmission is simply a more technologically advanced way of providing a copy of a musical work to the public as compared with selling the copy in a physical store.

- **Rogers Communications Inc. v. SOCAN**
  - **Holding:** Streaming music is not a private transaction between an online music provider and a member of the public and is thus a communication to the public by telecommunication.
Supreme Court Pentalogy

• Re:Sound v. Motion Picture Theatre Associations of Canada
  - **Holding:** Performers and makers of sound recordings are not entitled to equitable remuneration when their sound recordings are featured in movie or television soundtracks.
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