The Hidden, Contentious Issues of Copyright Co-Ownership

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One typically assumes a copyright owner to be a single person or entity – from the solitary novelist penning her latest work to the movie studio releasing a blockbuster hit. But consider the screenwriting duo who collaborate on a script, the band members who co-write a song, or the entrepreneurial programmers who jointly develop the next killer application. Should one screenwriter be able to write a sequel without the other? Can one band member license a song for use in a television commercial? What happens when one programmer wants to sell the application to a software giant? Careful consideration should be paid to the concept, and the pitfalls, of co-ownership of copyright.

The *Copyright Act* (Canada) states that, unless an exception is met, the author of a work will be the first owner of copyright in that work. So, if the work is a "work of joint authorship" as defined in the Act, and no other deeming provisions apply, the authors are the co-owners of the copyright. A work is one of joint authorship, generally, when it is produced through the collaboration of two or more people, except for situations where each person makes distinct contributions to the work (e.g., an artist who contributes distinct illustrations to a book), or where the contributions of others are mere ideas or inspirations (on the basis that each contribution must be capable of copyright). Since even a small contribution may be capable of copyright and could create joint authorship, great care must be taken by authors in allowing another person to collaborate in works.

Co-ownership in copyright can also arise in other situations. Copyright may be sold or assigned by one author to two or more people. Alternatively, the *Copyright Act*'s default ownership rules can deem joint authorship – the Act deems employers to own works created in the course of employment, and commissioned paintings or photographs to be owned by the person who commissioned them. While it may be difficult to imagine one person creating a single work for two employers, it is easier to foresee an artist creating a painting commissioned by two people.

What does it mean to be a co-owner, and, specifically, what right does each co-owner have to exploit (or prevent the exploitation of) the copyright? The answer to this question depends largely on the legal form of co-ownership, which may be decided by agreement or interpreted by the courts.

Looking first to other jurisdictions, co-ownership of copyright (absent an agreement) in the UK has been interpreted to mean "joint tenancy," where each owner holds an undivided interest in the whole copyright. This means that one owner who attempts to exploit the copyright without the permission of others may be liable for infringement, and no single owner or group could license, assign or sell the copyright without the consent of the rest. By contrast, courts and legislation in the U.S. have interpreted co-ownership to be "tenancy in common," where each owner holds a proportional interest in the copyright. Each owner, therefore, is not liable for infringement for non-exclusively licensing the work or selling his or her proportional interest in the copyright without the permission of the others. U.S. copyright law also requires each owner to account to the others for profits earned from licensing.

In Canada, unfortunately, there is little guidance in legislation or case law for the default interpretation of copyright co-ownership. The *Copyright Act* does not contain any provisions dealing with co-ownership situations; instead it simply contains the implicit provision that (absent a deeming rule) joint authors will be co-owners of a work. For example, s. 13(4) of the Act states that owners may assign the whole or partial copyright to their works in writing, but does not specify what level of consensus is required for co-owned works to be assigned or whether it can be done by each co-owner individually. Furthermore, while it has been argued that some early 20th-century case law supports the UK position on copyright joint tenancy (as do other Commonwealth decisions), there is a noticeable lack of Canadian cases directly on point, especially as between the competing interests of the co-owners themselves.

In fact, each Canadian province may have its own jurisprudence that determines whether property such as copyright is presumed to be held in joint tenancy or as tenants in common. Even with such presumption, the facts in each case could rebut it, as could an agreement among the co-owners. For example, a court may view co-ownership of copyright in a confidential document (where, presumably, the creators intended to restrict disclosure) differently than that in a published academic work (where, presumably, the creators intended to disseminate knowledge widely).

Before attempting to exploit copyright, and preferably even before a copyrightable work is created, joint authors and co-owners should agree in writing on their respective rights and obligations. Should one be entitled to "veto" a proposed licence? May co-owners license independently, or will licensing decisions be made on a majority basis? Should there be a differentiation between exclusive and non-exclusive licensing? If one co-owner licenses the work, are royalties owed to the others, or do the co-authors intend to go their separate ways with the work? May co-owners sell their "portion" of the copyright and, if so, what rights do the others have? Are co-owners entitled to develop derivative works such as sequels, adaptations or later versions? What happens when a co-owner dies?

Co-owners of copyright must consider these questions at the outset. Through the rose-coloured glasses of their creative endeavours, they may not see that co-ownership is rife with contentious issues.

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