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Updating Churches and Church related Charities on recent legal developments and risk management considerations.

1. INTRODUCTION

This is the eleventh issue of *Church & the Law Update*. It is intended to provide an update for churches and charities on current legal developments, as well as providing recommendations on matters of legal risk management where appropriate. The *Church & the Law Update* is prepared as a service to churches and charities and is published approximately three to four times a year as legal developments occur.

This issue of the *Church & the Law Update* provides:

- (i) An Update on Liability Exposure Arising Out of Sexual Abuse Claims;
- (ii) A summary of Ten Essential Steps to Protect Churches and Christian Ministries;
- (iii) An Update on Amendments to the *Charities Accounting Act* of Ontario; and
- (iv) Information on the Charities Program by the CBAO Charities Committee.

2. COPYRIGHT LAW IN CANADA WHAT EVERY CHURCH AND CHARITY SHOULD KNOW

Copyright Law in Canada recently underwent significant changes with the passing into law of *Bill C32 An Act to Amend the Copyright Act*. These changes are dramatic in their scope and impact and should not be ignored by anyone having contact with work in which copyright might subsist. Sadly though, it is my impression that most Canadians take little interest in matters of copyright, considering it to be an issue of importance only to musicians, authors and other types of artists, and their respective publishers.

The truth is, however, that this conclusion can not be farther from the truth. Issues involving copyright law pervade our society. And surely this situation will only continue to grow as our society moves from a reliance upon industrial production for the creation of wealth to one based on information and its transfer and allocation. The rise of the information age will see a concurrent rise in concern for matters of copyright as information becomes of increasing economic importance and societal significance.

The purpose of this paper is to focus on why copyright law is important to Churches, Charities and other non-profit organizations, and how the changes brought about by *Bill C32* will impact upon them.

Why bother with Copyright Law? Simply put, it affects every one of us on a daily basis, both at a personal as well as at an institutional

level. Despite this, however, few of us appear to be aware of the significant part it plays in our culture, or if aware seem to care. The shows that we watch have copyright in them, as does the music we listen to and the art that we appreciate. Copyright law is designed in principal to ensure that those that create in our society, have the chance to reap some benefit from their creations, while allowing the rest of us to appreciate their creations. As art and information becomes increasingly available to us, whether it be through the television, the newspaper, our radios or the internet, our opportunities to enjoy art and information will increase, as will our potential to violate copyright ownership in it.

Churches, charities and non-profits are no less affected by Copyright Law than individuals. Churches are especially likely to come into contact with issues involving copyright law. As one of the primary goals of a church is the dissemination of information related to its tenets, the dissemination of this information usually requires a heavy reliance upon literature and music, and the various forms of each. Almost invariably some form of copyright ownership exists in the literature and music used by churches, and as a result establishing their right to use it becomes of vital importance.

In order to understand the changes which have been affected to the Copyright Act through the introduction of *Bill C32* into law it is necessary to briefly outline some of the general principles of copyright law which existed prior to *Bill C32*. It must be understood at the outset that this review is cursory by necessity. Reliance should not be placed upon the contents of this outline as sufficient legal advice or information.

What Is Copyright?

Copyright is the right to control the production and reproduction of any original creative work which meets the criteria for eligibility, being originality, creativity and fixation.

For example, copyright exists in this article. Copyright does not exist in its contents, however. My right of ownership is limited to the manner in which I have presented the information contained in the article. The facts and ideas contained in it are public (i.e. "in the public domain) and not subject to ownership. As a result, copyright can be best described as a case of form over substance.

As owner of the copyright, I have a bundle of rights which allow me to control the manner in which my creation is dealt with. For example, I have the sole right to reproduce the work, to translate it or publish it.

I also have moral rights in the creation, which allow me to control and maintain my association with the creation, as well as the integrity of it. As such, even if I assign my ownership in the copyright in the article to someone else, unless I have waived my 'moral rights' in it, I still have the right to be named author of the article, and to ensure that the article is not modified in some manner which is detrimental to my reputation.

Who Owns the Copyright?

Normally the author of the creation is the first owner. The most significant exception to this is when the author is the employee of someone else and the creation was produced in the context of the employment relationship. In such a case, the creation is the property of the employer. It must be understood, however, that the author will still retain her moral rights in the work, even if it was clearly created within the context of her employment relationship.

Copyright can be assigned or licensed, either in whole or in part, with a variety of different limitations imposed on the grant. An assignment or license of copyright ownership can be limited to only certain of the rights of ownership, such as the right to publish, or translate. This situation of a limited assignment or license is often encountered in publishing contracts where an author has assigned over her rights in a certain country only to one party, while assigning over other rights to a different party in a different jurisdiction. The variations and permeations possible are relatively endless. As a result, it can often be a very complicated process in determining what rights are owned by whom when attempting to obtain the right to make use of a work in which copyright exists.

Assignment must be in writing to be effective. Moral rights cannot be assigned but can be waived.

In Canada reversionary rights exist which ensure that ownership of copyright in a creation revert to the estate of the author 25 years after his or her death, regardless of any grant given in relation to the creation. With respect to moral rights, the reversion occurs immediately upon the death of the author. The effects of such reversions are obviously dramatic in situations where either rights of ownership have been assigned or moral rights have been waived.

How Long?

In general, Copyright lasts for 50 years after the end of the calendar year in which the author dies, or a performance was performed.

After copyright expires the creation is deemed to be in the public domain and a party using the copyright is not subject to paying royalties with respect to using the creation.

If a work is in the public domain, then technically any party can make use of the work without worrying about copyright ownership. For example, a publishing company could put out a new edition of Moby Dick based on the original publication without obtaining permission from the author or his first publisher. Once that company publishes its new edition of Moby Dick, copyright will exist in that edition for the period proscribed by statute. If anyone should wish to make use of that edition while copyright subsists in it, they will have to have the permission of that publisher, or they will be in breach of copyright.

Infringement

Simply put, infringement occurs when someone does something with a work in which copyright subsists, which only the owner of the copyright in the work can do, such as copying the work or translating it, unless that person has authority to do so, or an exception exists which would authorize the act.

Exceptions are available but are limited in number. They include:

- (i) fair dealing such as private study;
- (ii) public reading of a work of literature;

Churches, charities and limited number of other types of organizations performing music in public, so long as the performance is done in furtherance of a religious, educational or charitable objective.

For example, if someone was to take this paper and translate it into another language, that person would be infringing copyright, unless permission to do so was first received from me. If, however, someone were to copy a portion of this paper for the limited purposes of private study into the issue of copyright, that person would possibly have the defense of fair dealing available to him or her. It must be remembered, however, that the Copyright Act does not provide any clear measuring sticks by which to determine if an exception is available in light of the use made of the work. As such, it is advisable to obtain permission from the owner rather than risk a court determining that infringement has occurred even though you felt that you were operating in a manner which made an exception available. The reason for fearing a determination that infringement has occurred will become apparent when I discuss issues of liability in the context of *Bill C32*.

What Remedies Are Available for Infringement?

An infringing party faces both civil and possibly criminal sanctions for infringement. More will be said about remedies when I discuss changes brought about to the Copyright Act through *Bill C32*.

Bill C32 'An Act to Amend the Copyright Act'

Bill C32 was passed into law on April 25th, 1997 with little if any fanfare. The provisions of *Bill C32* have been gradually implemented since then, with some sections still not in force as of the date of writing of this paper.

Bill C32 has brought about significant changes to the Copyright Act which are far-reaching in scope and extreme in application.

Note however that what was said in the brief summary above respecting Copyright Law remains essentially correct.

Changes of Significance to Churches, Charities and Non-profits

What follows is a brief outline of those areas of change which I believe will most directly impact upon churches, charities and other non-profit organizations. It would be, however, advisable for all who have contact with works in which copyright may subsist to review

the specific changes and how they will affect them with their lawyer.

Further, it must be understood that what follows is a 'brief' outline only of a limited number of areas and specific changes which in my opinion are of importance to churches, charities and non-profit organizations. This outline is not meant to be exhaustive. As a result, there may be other changes not discussed in this paper which are of specific importance to a particular reader as a result of their specific situation. Again, the recommended course of action is to obtain proper legal counsel from a lawyer with specialized knowledge in the field of Copyright Law.

The first change to be noted will no doubt affect us all, Churches, Charities and common folk alike. Blank tape levies will be coming to a store near you soon. All blank audio tapes will be affected. This change will hit you where it hurts the most: the pocket book. And at least you won't have to wonder whether you are infringing copyright when you use the tape. The premise behind this change to the Copyright Act is that you are (or will be) and the government authorizes charging us all accordingly.

The second change to be noted is of far greater significance. A number of new copyright owners have been created with the revisions to the Copyright Act, including Performers, Makers of Sound Recordings, and Broadcasters. As a result, the first owner of copyright in a performance is the performer, in a sound recording is the maker, and in a broadcast is the broadcaster. This means that several parties in the production and distribution of a work will now have a copyright interest in it. For example, with respect to a performer's performance, the performer will now have copyright in the performance, while the maker of any sound recording of the performance, where the maker has authority from the performer, will also have copyright, but in the sound recording. Ditto, for the broadcaster of any telecommunications signal of the performance, if the broadcast is done with the authority of the performer.

How will this impact on you? Significantly. For example, in the case of pre-taped audio recordings of music, royalties are normally paid to music composers, lyricists and publishers. Now, royalties will also be paid to performers for the taped performance as well as the makers of the recording. More dollars will be required for obtaining authorization to play music. And, of course, the chances of missing one of the various copyright owners has increased.

A third change to take note of relates to book distributors with exclusive distribution agreements for Canada. Book distributors with an exclusive distribution agreement with the owner of the copyright in the book have been given extensive powers to prevent the importation of copies of the book which may have been created outside of Canada without the consent of the exclusive distributor. The financial benefits of this to a distributor with such an exclusive distribution agreement go without saying.

As a result, if you are distributing a book in Canada you may want to see whether you are an exclusive distributor, and if so, take proactive steps to protect your interests. If you are planning to enter into a distribution agreement respecting books, you may want to contract to obtain an exclusive distributorship. The benefits of one are easily apparent.

Note, however, that the right to exclude is only in relation to the geographic area in which the exclusive distributorship pertains. As a result, when negotiating a distribution agreement, if you are the distributor, then attempt to get as wide a geographic area as possible, or areas of the highest population density in order to obtain and protect the greatest market possible. An exclusive distributor will be able to commence an action as a person interested in the copyright, and will be able to get damages, as well as injunctive relief.

Note also that knowledge by the importer that there is an exclusive distributorship in place is required if you are to get damages as well as injunctive relief. As a result, consideration should be given to registering the grant of an exclusive distributorship with the Canadian Intellectual Property Office, which, once registered will be deemed to be known by the importer.

A fourth change of significance relates to increases in penalties for copyright infringement as well as who can now get them.

Some of the changes to the penalties provisions include:

- (i) a wide injunction which will allow a court to impose broad restrictions on a party who has infringed copyright.
- (ii) The Copyright Act has been amended to allow for statutory damages [note that these sections are still not in force]. This change will allow a copyright owner to elect, at any time before final judgment in an infringement action, to recover a minimum of \$500 damages per instance of infringement of any one work to a maximum of \$20,000 damages instead of seeking an order of specific damages and profits.

Note that the court can reduce the amount to a minimum of \$200 if the infringing party had no reasonable grounds to believe that he or she was infringing copyright; if you chose to take the statutory damages still can get punitive or aggravated damages, and there exists no theoretical limit to the amount of damages available under this head.

How serious is this? If, for example, I were to cut out a good joke or article from a magazine and e-mail or fax it to a friend, I would be facing a minimum \$500.00 of statutory damages, up to a maximum of \$20,000.00 statutory damages for this one act, as well as punitive and aggravated damages and probably legal costs. Stiff punishment, especially when obtaining authorization to send the joke in the first place may have only cost me a few dollars, if even that.

A couple of things about statutory damages. Firstly, if owners of copyright had no incentive to prosecute infringing parties in the past, they do now. Expect to see a lot more litigation involving infringement. Secondly, as a copyright owner, registration of copyright is now all the more advisable, as it will limit a defense of no knowledge which may be raised by an infringing party. In general, if an infringing party can satisfy a court that it had no knowledge and had no reasonable ground for suspecting that copyright subsisted in the work, then only injunctive relief will be available. With the increased monetary relief available and the minimum amounts established, it is economically sensible to register copyright, or an assignment or license in order to defeat such a defense, as registration invalidates such a defense.

(iii) The Act now contains provisions to speed up the process of litigation, so that courts are to deal with matters in a summary matter, similar to the rules for simplified actions allowed under the Ontario Rules of Civil Procedure; If followed and properly applied this will probably increase the amount of copyright litigation as the process is sped up and procedural delays are overcome.

The changes to the Copyright Act relating to remedies will no doubt lead to in general to increased litigation. They also serve as an incentive to take the necessary steps to protect the copyright in a work, including registering the copyright and any assignment or license if you are the holder of the grant. As the Act has been changed to allow not only the owner of copyrights to register their interests, but also makers of sound recordings, broadcasters, assignees, licensees and any other person having any sort of interest in the copyright, registration will probably increase noticeably. Especially, since all of these parties can now commence proceedings to enforce their rights and restrict infringement.

Finally with respect to remedies please note that organizations established to represent authors and known as collectives will be able to get damages equal to no less than three times the cost of the royalty to a maximum of ten times the royalty. Clear financial incentive to prosecute infringing parties.

A fifth change of note is of special significance to all churches, charities and non-profit organizations which operate libraries or educational institutions. Increased and specified exceptions to copyright infringement have been introduced into the Copyright Act through *Bill C32* dealing specifically with the way that educational institutions, libraries, archives and museums deal on a day to day basis with material in which copyright resides.

There is now a definition for educational institutions wherein an educational institution is defined as either a non-profit institution licensed by or recognized under an Act of Parliament or the provincial legislature to provide pre-school, elementary, secondary or post-secondary education; or any other non-profit institution prescribed by regulations.

A lot of churches run their own schools or even seminaries. They will first have to determine whether they meet the above noted criteria as to whether their operation will be considered as an educational institution. They will then have to ensure that they fully understand the exceptions available to them which include, but are not limited to the following:

(i) It is not an infringement for a teacher making a chalk copy of a work on a black board or reproducing a portion of a work for exam purposes. This exception is only available so long as the chalk representation is being made for educational purposes and is erased when no longer needed. With respect to the exams, the reproduction can only be used on the premises. Further, the exceptions are not available if the subject-matter copied is commercially available.

The obvious problem is that the exception does not appear to take into account the advent of technology such as the internet and faxes, or the fact that a great deal of distance learning goes on.

(ii) It is not an infringement for an educational institution to hold a live performance of a work in public, primarily for staff and

students.

- (iii) It is not an infringement to perform a sound recording in public if it is played for students and staff.

Note that these acts must be undertaken on a non-profit basis. As a result don't expect this exception to extend to a school play performed for parents or one that is performed to raise funds. Under such circumstances make sure proper authorization from the copyright owner is obtained first.

- (iv) It is not an infringement to make a single copy of a news program or a news commentary program, excluding documentaries, for use with the students, so long as the tape is played in public within one year of being recorded. After the expiration of one year after making the copy, if the copy still exists, then the school must pay the royalties

If the school has a library, then several new provisions of note apply to it. Some of these provisions are;

- (i) A library can make one copy of a work if it is for the purpose of preservation and the original copy is in poor enough shape to require preservation, or is rare, damaged or lost. This last point I find particularly interesting – if its lost its going to be difficult to copy. If you have a copy to copy from then, I don't see how the lost exception even applies or is required.
- (ii) Copies of articles can be made for personal study or research, so long as the article is published in a scholarly, scientific or technical periodical; or a newspaper or periodical other than a scientific or technical periodical if the newspaper of such periodical was published at least one year before.
- (iii) In order to get the copy made the person seeking it will have to satisfy the library that the person requires it for personal study or research the person can only be provided with one copy and all other copies must be immediately destroyed. Again, the difficulty lies in ambiguity of the language used. What constitutes a scholarly, technical or scientific periodical is unclear. Would Omni magazine, with its constant emphasis on UFO's constitute a scientific periodical? It will be up to the library to make the decision and risk copyright infringement.
- (iv) An educational institution and library will not infringe copyright if a copy is made using a photocopier located on the premises which has a notice warning against infringement affixed on or near it and the machine is installed for use by students and faculty; however, the above noted exception will only apply where the educational institution or library has entered into a licensing agreement with a collective authorized by copyright owners to act on their behalf.

For educational institutions and libraries the challenges posed by the revisions to the Act should be obvious. Greater policing of photocopiers will be required. Unauthorized use of photocopiers by non-students or staff may give rise to an action for damages against a school or library. Greater policing of staff and students will be required to ensure that copying meets the exceptions available before the school or library allows photocopying.

Further, the incentive to enter into a license respecting the use of photocopies has clearly increased substantially. I would suggest that the decision to either purchase a cheap would suggest that the decision to either purchase a cheap license or risk damages will be one to be easily made by institutions.

A sixth change of note is that assignments or licenses concluded with copyright owners before April 25th, 1996 will not be construed as having included a grant of any of the rights contained in *Bill C32*. As a result, if you hold an assignment or license entered into prior to April 25th, 1996 and you want some or all of the rights contained in *Bill C32* it may be necessary to revisit the agreement if possible. And once again, if you are a party to such an agreement it would be advisable to review it with your lawyer to determine if it meets your needs.

SOME PRACTICAL THINGS CHURCHES, CHARITIES AND NON-PROFITS SHOULD KNOW ABOUT COPYRIGHT IN CANADA

Firstly, the changes brought about by *Bill C32* have increased the motivation and temptation to enforce copyright. The monetary incentive, combined with the summary provisions for enforcement, and the entitlement of a number of parties who have an interest in the work to bring an action to enforce copyright should lead to an increase in litigation, as well as an increase in collectives and individuals looking for royalties. Recently, the Law Society of Upper Canada commenced litigation against a number of the legal

publishers over their claims for royalties for the case law used by lawyers to assist their clients. Churches, charities and non-profit organizations make use of copyright material on a regular basis. For example, in my own church I am often greeted in the service handout with humorous excerpts. I can't think of any exception which would be applicable to justify their inclusion into the service handout. As a result, copyright infringement is occurring unless authorization from the necessary authorization of the owner of the copyright has been obtained. With the increases in penalties, it is good counsel to recommend that churches, charities and non-profit organizations examine how they use material in which copyright exists or might exist to ensure that they are not opening themselves up to unnecessary and potentially expensive litigation, especially when a lot of the royalties are relatively inexpensive.

Secondly, the exceptions available to a claim of copyright infringement are limited in number and scope. Do not simply assume that an exception will apply. Further, even if it would appear upon a summary review of how material is being used that an exception applies to that usage, don't be so sure. For example, fair dealing requires that the use to be made of something be 'fair'. Fair is a relatively vague term, and while it has been defined to some extent by case law, there is room for disagreement as to what constitutes fair. Remember that when there is room for disagreement, there is clearly enough room for lawyers. Not that I am complaining, though.

Thirdly, if a church, charity or non-profit organization is the owner of a copyright or copyrights in material, or in a position to have an interest in a copyright as either an assignee or licensee they should take sufficient steps to protect those rights, including registration of the copyright or copyrights, assignments or licenses and taking reasonable steps to enforce their ownership rights against infringing parties. Failure to act may constitute a defense in litigation. Also, the increased monetary awards should act as clear financial incentive to churches, charities and non-profits to protect their interests.

Fourthly, and leading directly out of the third point, is ensuring that employment situations are fully understood and clearly established with respect to works created by employees within the context of their employment. Choir masters who create music for use by a church choir or congregation, would likely be determined by a court to have done so on behalf of the church, thereby investing the church with ownership of the work. The same reasoning will hold true with respect to books, tracts, inspirational readings, and possibly sermons created by ministers within the scope of their employment. Determination of who owns what will be based on a review of the terms of employment, including amongst other things, whether tax is deducted from source, what degree of control the church exercises over the actions of the minister. Clearly, the question of ownership is important, especially when the works are being recorded or recreated for use of shut-in congregation members or distribution for broad consumption.

Good advise to churches, charities, non-profit organizations and their employees is to begin negotiating their employment contracts to take into account the ownership of works created by the employees, especially where the question of ownership is somewhat gray. The issue of sermons is a case in point. I could find absolutely no case law or commentary on point to lend guidance on this subject of ownership in the sermon. However, in speaking with a copyright lawyer practicing in the United States who acts on behalf of a large number of churches, I was informed that it has become common for ministers and churches to deal with the issue of ownership of such things as their sermons at the outset of their relationship when negotiating the employment contract.

Finally, with respect to this issue, if you are looking to obtain an assignment of a work, remember to obtain a waiving of moral rights, and a sufficient assignment to cover your needs. The same holds true with a license. For example, if you are looking to obtain artwork for use in advertising or in a church or charity design mark or logo, ensure that you not only obtain the full assignment of the artist's rights of ownership, but that you also have the artist waive his or her moral rights, as you may want to modify the work of art sufficiently to fit into your needs. If you don't obtain a waiving of moral rights you could be facing a claim by the artist that you have infringed his or her moral rights by modifying the work. Again, unneeded and easily avoided litigation which can be countered with properly prepared documentation.

A further concern which will now have to be addressed since makers of sound recordings and broadcasters are now being given copyrights in their recordings and broadcasts respectively, is that the church, charity, or non-profit organization which decides to employ the services of such parties must do so with full knowledge of what is being given up and to whom. Obvious negotiation over rights will be required, if retention of those rights is desired.

Leading out of the last point is the affect that the extension of rights to makers of recordings and broadcasters will have upon cross-border licenses. If a Canadian church or charity is a licensee to an American owner, I would doubt that the license agreement has been drafted with an eye to the changes brought about by *Bill C32*. I doubt that an owner in America would be happy to find any other party showing an interest in the work, and having the ability to commence applications to enforce their rights.

With respect to the exception available to churches to perform music in public for religious purposes, understand that that exception extends only to performing the music but does not extend to reproducing the sheet music or words of the music for use by the congregation or choir. In order to deal with this situation, collectives have formed which offer to churches for a fee a license to make limited use of sheet music or lyrics with respect to a limited repertoire. While I am not commenting either way on whether such collectives are good or bad, I would remind churches that they only get what they pay for and possibly not even that in some cases. Remember that there is a limited repertoire available. Check to see if the artists listed in the repertoire have in fact given authority to the organization to act on their behalf. Also, remember that you don't have to pay for what is in the public domain. If the sheet music is very old then it is doubtful that copyright even exists in it. Finally, ensure that you are fully aware of the limitations of the license. One organization that I am aware will provide you with a license to do certain limited things with the repertoire, including photocopying the lyrics of songs for distribution to the congregation, as well as preparation of overheads to be used to lead the congregation in song and taping of the service for distribution to shut-ins. That, however, is the general limit of what is granted. For example, the license may not extent to the photocopying of octavos, cantatas, musicals, or other specific types of music.

Further, note that while such licenses purport to extend the right to tape music performances within the church setting, I doubt that the license would include and authorize the creation of copyright in the maker of the musical recording which will now accord as a result of *Bill C32*. Just a little food for thought when a private organization is engaged to record your services for distribution to shut-ins.

CONCLUSIONS

Change has made the exposure for infringement significant, while increasing the value of copyright ownership equally. Be proactive. Guard what you own, and guard against taking what belongs to others.

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