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COPYRIGHT ISSUES FOR CHARITIES AND NFPs IN THE DIGITAL ERA


By Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent
sbonni@carters.ca

1-866-388-9596

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BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto (416) 675-3766 Ottawa (613) 235-4774
Mississauga (416) 675-3766 Orangeville (519) 942-0001
www.carters.ca www.charitylaw.ca

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>SPRING 2017 CARTERS CHARITY & NFP WEBINAR SERIES June 8, 2017</p>
<p>Copyright Issues for Charities and NFPs in the Digital Era</p> <p>By Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent sbonni@carters.ca 1-866-388-9596</p> <p>© 2017 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Toronto Ottawa Orangeville Mississauga www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</p>

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	<p>Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articulated and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance issues.</p>
<p>www.carters.ca</p>	<p>www.charitylaw.ca</p>

OVERVIEW

- What is Copyright?
- Why Does Copyright Matter?
- The Purpose and Function of Copyright
- What Copyright Protects
- What Copyright Does Not Protect
- Infringement
- Exceptions to Infringement
- Methods of Copyright Protection
- Moral Rights
- Copyright Issues for Charities and NFPs

A. WHAT IS COPYRIGHT?

- In simplest terms, “copyright” means “the right to copy”
- Only the owner of copyright (often the creator of the work) is allowed to produce or reproduce the work in question or to permit anyone else to do so
 - Copyright law rewards and protects your creative endeavour by giving you the sole right to publish and/or use your work in various ways
 - You may also choose not to publish your work and to prevent anyone else from doing so
 - The *Copyright Act* contains many variations and exceptions to this basic principle, and copyright issues are often complex

B. WHY DOES COPYRIGHT MATTER?

- Copyright affects everyone at both personal and institutional levels
- The shows that we watch have copyright in them, as does the music we listen to and the various forms of art and media that we appreciate
- The use of digital platforms, such as social media sites, allows individuals to reproduce copyright protected work in an instant
- As a result, organizations must ensure that their copyright protected work is not infringed, and also that they are not infringing another organization's copyright protected work that exists online

- Establishing a legal right to use these types of works therefore becomes of vital importance
- If left unchecked, reproducing or performing copyright protected work without the permission of the copyright owner can violate the copyright owner's rights to control reproduction of their work
- This type of violation is referred to as infringement, and copyright owners have legal remedies under the *Copyright Act* against those who have infringed their work



- Charities and NFPs will use or produce many types of “works” that are subject to copyright law
 - Publications used to promote or further a cause or purpose
 - Media that is used for fundraising and soliciting donations
 - Educational courses - written material for students and instructor resources such as activity outlines
 - Artistic work including crests, design logos and other marketing material to appeal to donors, members and the public

C. THE PURPOSE AND FUNCTION OF COPYRIGHT

- Generally, copyright laws protect owners by regulating some forms of expression in order to give consideration and respect to owners’ rights
- Copyright grants rights to creators to prevent the un-consented reproduction and exploitation of original literary, dramatic, musical, and artistic work to which they own the copyright



- The *Copyright Act* also recognizes and protects the creator’s “moral rights”, which belong solely to the author of the work and exist independently of copyright
- Therefore, even when the copyright in a work is assigned, the author of an original work continues to have “moral rights” protected under the *Copyright Act*



- These rights include the rights to:
 - Attribution: being named as the author or the right to remain anonymous
 - Integrity: protecting the work from being distorted, mutilated or otherwise modified if this would prejudice the author’s honour or reputation
 - Association: control over the use of the work in association with a product, service, cause or institution that is prejudicial to reputation
- While copyright may be bought, assigned or licensed, authors generally retain their moral rights, which cannot be transferred to third parties
- In short, moral rights can be waived but not assigned



D. WHAT COPYRIGHT PROTECTS

- Copyright protects original works
- The word “original” is key in defining a work that qualifies for copyright protection
 - The work does not need to be new, but must originate from the author, not be copied, and involve some intellectual effort
- Originality can be tricky to determine and many court cases revolve around the question of whether a work has been copied, even in part, from someone else’s work



- Copyright protects original literary, dramatic, musical and artistic works - each of these general categories covers a wide range of creations, e.g.:



- a) Literary works: books, pamphlets, poems and other works consisting of text and computer programs



- b) Dramatic works: films, videos, plays, screenplays and scripts



- c) Musical works: compositions that consist of both words and music or music only (note that lyrics without music fall into the literary works category)



- d) Artistic works: paintings, drawings, maps, photographs, sculptures and architectural works

E. WHAT COPYRIGHT DOES NOT PROTECT

- Titles, names and short word combinations are usually not protected by copyright
 - A “work” or other “subject matter” for copyright purposes must be something more substantial
- As copyright is restricted to the expression in a fixed manner (e.g., text, recording, drawing) of an idea, it does not extend to the idea itself
- Facts, ideas and news are all considered part of the public domain, that is, they are everyone’s property



F. INFRINGEMENT

- Since a copyright gives you the sole right to produce or reproduce your work, through publication, performances, etc., or to authorize such activities, anyone who does such things without your permission is infringing (e.g., violating) your rights
- Naturally, if you publish, perform or copy anyone else’s work without their permission, you are infringing their rights
- One form of infringement is plagiarism - e.g., copying someone else’s work and claiming it as your own
- Using a substantial part of someone else’s work - e.g., copying a novel, and simply changing the title and names of the characters

G. EXCEPTIONS TO INFRINGEMENT

- Fair Dealing - The *Copyright Act* provides a fair dealing exception where copying is for one of the following purposes:
 - Research, private study
 - News reporting
 - Criticism or review
- These fair dealing exceptions were expanded in 2012 to include:
 - Education
 - Parody or satire
- If “dealing” in a work was for one of these purposes, then there may be no infringement if the dealing was also “fair” - these exceptions are not absolute



- Private Purposes - Non-commercial use of content, reproduction for private purposes, fixing signals and recording programs for later listening or viewing, and backup copies
- Educational Institutions, Libraries, Archives and Museums - These institutions are given certain exceptions as long as their use of the copyright materials is done without a commercial motive of gain
- Religious, Educational, Charitable or Fraternal Organizations - This exception permits specific organizations to use copyrighted works for musical performances if the use is in furtherance of a religious, educational, or charitable object (this generally would not include a fundraising event)

- User-Generated Content (“YouTube Exception”) - Individuals may use sections of copyright material in new works without a license, as long as they meet the certain legal requirements
- The question of whether or not a particular exception applies is highly nuanced and requires a case-by-case analysis to determine if a particular use of copyright protected material would be covered under an exception to infringement



H. METHODS OF COPYRIGHT PROTECTION

1. Automatic Copyright Protection

- Copyright in a work arises automatically and does not require registration
- Under the *Copyright Act*, there is automatic copyright protection for an author if, at the time of an original creative work, he or she is a Canadian citizen or person ordinarily resident in Canada, or is a citizen of subject of various other international convention countries
- Even though copyright protection in Canada often extends to similar protection in other countries under international conventions, specific international laws may differ from the Canadian law

2. Registering for Copyright Protection

- While an original work automatically receives some protection upon being created, the only official record of a copyright ownership is if the copyright is registered
- Registration of copyright is *evidence* of ownership - as such, registration may be advisable in some circumstances so an official record is established showing that the author created the work



- If a copyright is registered, the party seeking to dispute the copyright bears the onus of leading evidence to the contrary
- Presumption of valid copyright is a huge advantage of registration, particularly for charities and NFPs which experience a high rate of turnover of personnel, and which might therefore find it difficult to lead other evidence of creation of a work at a later date
- To register a copyright, an application for registration must be completed online or sent to the Canadian Intellectual Property Office (“CIPO”)
- While registration creates a presumption in the organization’s favour, registration is never a guarantee against infringement

3. Notice of Copyright Ownership

- Another way of protecting a copyrighted work is for an author to mark his or her work with a notice of copyright ownership
- This can be done even if the copyright is not registered
- Marking works is a proactive way for a charity or NFP to demonstrate to others that it is aware of its rights pursuant to the *Copyright Act*, and this alone may serve to deter potential infringers from violating the copyright
- The Universal Copyright Convention provides for marking with the symbol ©, owner's name, and date of work created, e.g., © Sepal Bonni, 2017



4. Copyright Policies



- A charity or NFP can help to reduce the risk of copyright infringement by creating a Copyright Policy for employees and volunteers to follow - it should be accessible and visible in areas where copying is likely to take place, such as near photocopiers and on the organization's computers
- A Social Media Policy should also be implemented that addresses the organization's policies regarding copyright protected works
- A charity and NFP should also have policies in place that protect its own copyright protected material and have public notices in place regarding its ownership of copyright on printed material and on its website

J. COPYRIGHT ISSUES FOR CHARITIES AND NFPS

- As already discussed, copyrights can be a significant asset if effectively managed, but can also result in liability to an infringing organization
- Important questions for charities and NFPs to ask are:



- Whether the organization has the rights necessary to carry out its activities without infringing on the rights of others?
- Whether the organization possesses good title to the copyright that it considers its owns?

1. Work Created By Employees and Volunteers

- Generally, the *author* of the work is the *owner*, unless an exception exists, such as:



AUTHOR

- Work made in the “course of employment” “under a contract of service” vests in the employer, unless there is an agreement to the contrary – note: the author still retains moral rights in the work
- The author is whoever writes, produces or otherwise creates a creative work
- Corporations cannot be authors – author must be human
- There can be multiple authors for one work

- One difficult question that frequently emerges is whether a person is under a “contract of service” or a “contract for services”
- Independent contractors and quasi-employees are not usually considered to be under a “contract of service”
- Volunteers are not usually considered to be “employees”
- Therefore, a charity or NFP will not automatically own the rights to works its volunteers or independent contractors create
- Disputes can arise over ownership of copyright works
- Often charities and NFPs will be surprised to learn what they do not own the copyright for

- Situations to watch for:
 - Volunteers
 - Independent contractors
 - Web designers
 - Logo designers
- For anyone who is not an employee, the organization will need to obtain an assignment of rights if it wants to own the copyright in works authored by that person
 - Include waiver of moral rights
- Even with general rule regarding employees, it is recommended to clarify in writing, often by including appropriate terms in the employment contract



- As a result, contracts should be reviewed to:
 - Ensure they clearly state that the organization is the owner of all work and that moral rights are waived
 - Ensure that similar contracts are in place for volunteers, website designers, independent contractors, etc., otherwise the copyright vests in these entities by default
 - Ensure reference is made to the various employment policies, such as the social media policy



2. Using Third-Party Material

- Generally, employees and volunteers of a charity or NFP will not know the ins and outs of copyright law
- Employees and volunteers may not consider whether copyright applies to a work, or may assume that an exception applies or that they will somehow be personally exempted from responsibility
- If an employee or volunteer infringes copyright in the performance of their duties for the organization, then it is ultimately the organization that will be held responsible in most cases

3. Internet Photo Copyright Infringement

- Employees of charities and NFPs may have at one time or another copied and pasted images from online sources such as Google.ca for use in publications, websites, etc.
- Although the infringement may not have been intentional, without obtaining express authorization from the copyright holder or licensee of the copyright, charities and NFPs may liable for copyright infringement
- As a result, the copyright owner may send a letter requesting the charity or NFP to pay a large sum of money or threaten legal action

- Court Case:
 - Trader Corp. v CarGurus, Inc.
 - Trader Corporation and CarGurus, Inc. are competitors in the “digital marketplaces”, which include listings of vehicles on their respective websites for sale
 - Trader’s photographers offered “Capture Service” of going to dealerships and taking photos of vehicles to include in the listings of cars for sale
 - CarGurus came to Canada and used the same methods to extract or “scrape” data from other dealers’ websites and posting it on their website.

- The court awarded \$305,064 in damages
- This case is a good reminder for charities and NFPs that using photos from the internet can have serious consequences
- As a result, charities and NFPs should be careful not to reproduce photos extracted from the internet on their websites without obtaining the requisite consent. It is best to first consult with legal counsel

4. Social Media and Copyright



- Examples of Social Media: LinkedIn, Facebook, Twitter, Instagram, Pinterest, YouTube, Google+, etc.
- Ensure copyright of others (and your own) are not infringed
- Social media can expose your organization to liability for infringing the copyright rights of others
- Monitor social media sites for postings by employees and third parties that may infringe copyrights of others
- Review posted content and consider who is the owner of the work
- If the organization does not own the work, any reproduction of that work on social media can constitute copyright infringement

5. Copyright in Gifts of Art



- Art is often viewed as an asset
- When a gift of art is made to a charity, consideration must be given to the following:
 - Is the art authentic?
 - Is the individual that is providing the gift of art entitled to do so?
 - What is the value of the art?
 - Did the gift include the assignment of copyright in the work or did the artist retain copyright?
 - Was there a waiver of moral rights by the artist?

- Importantly, a transfer of tangible property does not automatically equate to a transfer of copyright
- Whether or not the artist retains copyright in the work will impact the valuation and the receipted amount that is provided to the donor
- This can have tax-related consequences (which will not be discussed today) that should be carefully considered if a gift of art is received



6. Assigning or Licensing Copyright to Others

- A copyright assignment is when the copyright holder transfers ownership of the copyright to another person or organization
- A copyright license is when the owner of the copyright allows another party or organization to use the copyright
- 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 rights of ownership, such as the right to publish or translate

- While work by an employee or other “work for hire” can often be assigned to an organization, using work created by a third party usually requires a license
- Other organizations that want to use a work created by the charity or NFP may request a license to use the work
- Sometimes a license to use a work can be implied from the circumstances under which a work is created or provided, but it is best practice to always obtain evidence of a license in writing



- A license to use an individuals work can be granted by the owner of the work
- A license sets the terms and conditions for acceptable use, some factors to consider include:
 - Geographic region
 - Duration
 - Purpose
 - Medium, language or translation
- Before a charity or NFP licenses a work to a third party, it is essential to confirm that the charity or NFP has obtained ownership of the work permitting it to do so, otherwise it may be held liable for infringement by the licensee

- If the only way to obtain a license was to contact each owner in every case, copyright issues would lead to impractical and inefficient use of resources in NFP and for-profit sectors
- The *Copyright Act* provides for collective administration of owners' rights by collective societies
- Collective Societies represent a common interest group or type of copyright owner and sell licenses and collect royalty payments on their behalf
- Purpose is to allow "one-stop shop"



- Some relevant examples include:
 - Society of Composers, Authors and Music Publishers of Canada (SOCAN)
 - Access Copyright, The Canadian Copyright Licensing Agency
 - Christian Video Licensing International (CVLI)
 - Christian Copyright Licensing Inc. (CCLI)
- Other listed on the Copyright Board of Canada website at: <http://www.cb-cda.gc.ca/societies-societes/index-e.html>

SUMMARY

- It is beneficial for charities and NFPs to familiarize themselves with the laws surrounding copyright, to register their copyrights, and to implement policies and procedures regarding copyright to avoid any unintended consequences



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