THE PERILS OF CO-AUTHORING CREATIVE WORKS

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Important legal issues arise if multiple authors together create a copyrightable work such as a music composition, literary or artistic work or software program ("Work"). This article discusses a few of these issues so creators can understand and deal with these issues, and avoid a divisive co-author relationship.

In Canada, a work of joint authorship (a "Joint Work") is a Work with two or more authors where the individual contributions cannot be readily distinguished. An example of this would be a typical song where the contribution of each composer is "merged" into one musical expression (and, as a result, one copyright). A Joint Work should be distinguished from a Work written in distinct parts (a "Collective Work"). Each distinct part of a Collective Work might be separately copyrightable.

The authors of a Joint Work each hold equal shares in one copyright. All decisions affecting the Joint Work must be made jointly. For example, one co-author cannot license or sell his or her partial ownership in the Joint Work except with the agreement of all the other co-authors. Contrast this with ownership of a Collective Work where, because each author holds a copyright that is distinct from other copyrights in that Collective Work, each author can sell, reproduce and license their portion of the Collective Work.

Serious issues can arise when several people get together to create "one work", but have not agreed that what they are creating is a Joint Work. One contributor might consider that the work is not even a Joint Work, while other contributors might consider that it is a Joint Work, in which case all the contributors should have joint control over the reproduction of the Work, and should have a right to share in any financial benefits of ownership. These issues were at play in the following case, which involves music compositions. The same type of issue can arise with other multiple-contributor Works.

In *Neudorf v. Nettwerk Productions Ltd.* (British Columbia Supreme Court, 1999), lengthy consideration was given to the question of joint authorship of songs. In 1988, a record of Sarah McLachlan entitled "Touch" was released in Canada by Nettwerk Productions Inc. and later re-released as a CD in Canada and in the United States. Credit for composing all the songs was taken by Ms. McLachlan, except for two songs which were also credited to Mr. Darren Phillips. Darryl Neudorf, the plaintiff, took action against Nettwerk, Sarah McLachlan and others for a declaration of co-ownership of copyright in four of the "Touch" songs, alleging that he had co-authored the songs and that Nettwerk and the other defendants had infringed his copyright in making an unauthorized use of the songs (that is, Neudorf had not agreed to the reproduction and sale of songs which he co-authored.)

The Court developed a three-part test for joint authorship:

1. Did Neudorf contribute significant original expression to the songs? If yes,
2. Did each of Neudorf and McLachlan intend that their contributions be merged into a unitary whole? If yes,
3. Did each of Neudorf and McLachlan intend the other to be a joint author of the songs?

On the first part of the test, the Court held that, as a general principle, a mere contribution of ideas such as saying "go there" or "try this", was not sufficient and in fact, in offering up chord or lyric changes Neudorf might be merely offering up "suggestions", which McLachlan would be free to accept or reject.

The Court in fact found in favour of Neudorf on the first test, and the second test, but on the third part of the test ruled that there was no shared intent to co-author. As a result, there was no co-authorship. The result was that Neudorf gave away his creative contributions, because he could not establish that there was a mutual intention that the result be a Joint Work. Had Neudorf put an agreement in place recognizing his contributions as co-authorship contributions, he would have been entitled to a portion of the revenue generated by McLachlan from the songs in question.

This case confirms that the test for joint authorship in Canada is similar to that in England and the United States: a "mutual intent is a prerequisite for a finding of collaboration".

There are two simple lessons that come out of this case:

1. Where there are multiple contributors, all the contributors should agree on the nature of their contributions and set out their intentions in writing regarding ownership of the resulting work. The important part is to agree that each author has the "intent to work together to create a valuable and original work".
2. Unequal contribution can be reflected in an agreement by allocating ownership and rights in differing proportions. If the contributions are generally equal, then the agreement can identify the work as a Joint Work with benefits shared in equal proportions among the contributors. If the contributions are not equal, the parties to the agreement can agree on different proportions. The parties should also identify whether or not the revenue split should be done following the ownership percentages or on some other basis.

A little agreement up front can solve many problems down the road, and permit the band composers to work together, the literary authors to brainstorm together and the software developers to contribute their "bits and bytes" together, confident in each case that they will be fairly treated and rewarded for their individual contributions.

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