



## **Creating Contracts By Email - "Written" Doesn't Always Mean "In Writing"**

November 14, 2011 by Bob Tarantino

Two recent court decisions (one Canadian, one American) serve as useful reminders that binding contracts and assignments of rights can be created via exchanges of emails almost as easily as they can be created by "written" documents. In the entertainment industries, which sometimes exhibit fast-moving and casual interactions in which the intention of the parties to create binding contractual commitments is not always clear, it is worth being cognizant about the fact that email communications can bind you to a deal.

As Mark Weisleder notes in the *Toronto Star* ([Can You Sell Your Home by Email?](#)), a recent court decision in New Brunswick has held that a binding contract for the sale of real property (in this case a condominium) can be created via email exchange (it should be noted that [leave to appeal has been granted](#) by the Court of Appeal of New Brunswick).

In the United States, the Court of Appeals for the 11th Circuit ([Hermosilla v The Coca-Cola Company](#)) has confirmed that copyright can be transferred by exchanged emails which constitute a contract. In *Hermosilla*, it was held that copyright in Spanish lyrics crafted by the plaintiff had been transferred to the defendant because the exchanged emails constituted a binding agreement, even though the parties intended to enter into a long-form written contract but never actually did so. (The Property, Intangible blog has a [nice overview of the Hermosilla case](#) - hat tip: [Clancco](#))

Students of Canadian copyright law might query whether these decisions are of relevance to Canadian copyright questions - doesn't [Section 13\(4\) of the Copyright Act \(Canada\)](#) require transfers of copyright to be "in writing"? The Act states that "no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made". The question of relevance will be answered by reference to provincial/territorial legislation: in Ontario, for example, the [Electronic Commerce Act](#) stipulates that "a legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference" (Section 5) and also clarifies that "a contract is not invalid or unenforceable by reason only of being in electronic form" (Section 19(3)).

Exchanging emails is often useful because it can assist in providing a documentary record of discussions between the parties - but parties should be careful not to inadvertently create a binding contract (whether or not involving a transfer of copyright).

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