

A recent [decision](#) of the Federal Court considers what is required to be an author of a computer program.

## **The Facts**

The applicant was a former employee of the respondent group of companies (collectively the “Respondent”). He claimed that he was a joint author and joint owner of a series of related programs (the “Software”) in the possession of the Respondent. He sought a declaration that copyright subsisted in the Software and that he and another individual were joint authors and owners of it as well as other relief.

The applicant had signed a number of agreements relating to his employment as well as a confidentiality agreement. However, he took the position that his contribution as author of the Software was outside his employment relationship with the Respondent. In substance, the applicant said that he had reached an agreement with the principal of the Respondent and that as a result of his collaboration and development of the Software he was to receive an equity interest in the Respondent in nature of a partnership interest.

With respect to his contribution to the software the applicant said that he made intellectual contributions that were instrumental to the overall design, layout, functionality and expression of the Software. The applicant was not actually involved in the preparation of any code and there was no evidence as to the linkage between his contributions and its expression in the Software or its code.

The applicant had obtained copyright registrations relating to his alleged joint ownership interest in the Software.

## **The Decision**

The judge started his analysis by referring to the fact that in order for copyright to subsist in a work, the work must be original. The originality required to obtain copyright protection in the expression of an idea must consist of the exercise and skill of judgement. The reference to skill requires the use of the author's knowledge, developed aptitude or practised ability in producing the work. The reference to judgement requires that the author make use of their capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. The exercise of skill and judgement requires intellectual effort and must not be so trivial that it could be characterized as a purely mechanical exercise.

Under the *Copyright Act*, a computer program means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result.

The judge referred to English cases involving computer programs which said that copyright is concerned with the process of the creation of the work and not the ideas going into the work nor with the functionality or the end product results. In computer programming what is capable of protection is the code that is written by the programmer including the design and structure of the program.

The judge referred to the dichotomy between ideas and their expression in the context of copyright. It is clear, under Canadian law, that an author of a work is entitled to copyright protection if they exercise skill and judgement which results in the expression of a work in material form. However, copyright does not subsist in arrangements, systems, schemes, methods for doing things, procedure, process, concept, principle or discovery, but only in the author's original expression of them.

When this approach was applied to the facts of the case, the judge concluded that the applicant had not provided any evidence as to the linkage between his contributions and their expression in the software. As such, they fell into the category of ideas, methods, procedures, algorithms or other similar contributions, which, although valuable are not protected by copyright.

With respect to the certificates of registration of copyright obtained by the applicant, the judge said that while a certificate has some evidentiary weight it will only be given effect to by a court in the absence of evidence to contradict it. In this case there was evidence that contradicted what was said in the certificate.

As a result of the conclusion concerning the applicant's contribution it was not necessary to give consideration to the effect of the various agreements he had signed or the effect of the alleged oral agreement.

### **Comment**

Like many cases involving intellectual property the facts are vitally important. In this case, the applicant's affidavits failed to set out a specific linkage between his contributions and their expression in the Software.

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*These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.*