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Employment Update: Who Owns the Copyright in What Your Employees Create? Lessons from Nexus Solutions Inc. v. Krougly

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Many employers assume they automatically own everything their employees create on the job. Under section 13(3) of the *Copyright Act*, an employer is the first owner of copyright in a work created by an employee in the course of their employment.

A recent decision from the Ontario Court of Appeal considered the scope of that provision. In *Nexus Solutions Inc. v. Krougly*, 2026 ONCA 199, the Court confirmed that an employer's copyright claim under Canada's Copyright Act hinges not on what the employer *could have* asked the employee to do, but on what they *actually* asked them to do. The result? Even when an employee secretly builds a competing product while on the payroll, the employer may have no copyright claim to it in some circumstances.

Background

Nexus Solutions Inc. is a software company that develops an emissions monitoring software called CEMView. Krougly was a senior software developer at Nexus and his job was to develop the existing CEMView software. He was explicitly told not to undertake any unauthorized software development. There was no written employment contract.

While still employed at Nexus, Krougly secretly began building a competing emissions monitoring program he called "Limedas." He worked on it during his personal time and using his own equipment. After resigning, Krougly went so far as to market Limedas to Nexus's own customers.

When Nexus discovered what had happened, it went to court seeking, among other relief, a declaration that it owned the copyright in Limedas under section 13(3) of the *Copyright Act*.

What the Court Decided

Nexus lost – both at trial and on appeal.

Despite the fact that Krougly developed a directly competing product while employed as a software developer at Nexus, the courts found that Limedas was *not* created "in the course of" his employment. Here is why:

- Krougly's primary job was to develop the existing CEMView software. He was not authorized to create new software products without prior approval, and in fact was expressly forbidden from doing so. Krougly was not asked or directed to develop Limedas and his work on it was not at the direction or within the control of anyone at Nexus.
- He built it on his own time, with his own resources. The vast majority of Krougly's work on Limedas was done outside business hours and did not use Nexus property. Nexus did not bargain for or expend resources on Limedas, nor did it assume any major risks involved in its creation, production or distribution.
- While there were similarities between the two programs, there were also substantial differences (e.g., different source codes and dissimilar algorithms and data), and the Court found that Krougly did not copy any substantial portion of CEMView in creating Limedas.
- There was no written employment agreement. Also, there was no written agreement that prohibited Krougly from working on his own projects on his own time or that addressed ownership of works created by Krougly outside of his employment duties.

The Key Legal Principle

Nexus tried to argue that the right test should be whether the work falls within the general "class or kinds" of work the employer *could* have asked the employee to do. The Court firmly rejected this.

Instead, the Court held that what matters is the employee's *actual responsibilities*, not their potential responsibilities. As the Court put it, the fact that an employer could require an employee to do a task is necessary but not sufficient for that task to fall within the employee's course of employment.

The trial judge acknowledged that the outcome was "harsh" given the conclusion that Krougly secretly developed software that was meant to compete with his employer's software. However, copyright law is not designed to punish bad actors just because their actions may run afoul of their duties towards their employers. Other legal remedies, like claims for breach of an employee's duty of loyalty to the employer, breach of contract or breach of fiduciary duty, might address that misconduct, but those claims were not before the Court on this appeal.

What This Means for Employers: Five Practical Steps

This decision is a clear signal that employers should carefully consider the application of section 13(3) of the *Copyright Act* to protect their interests. Here is what employers can do about it.

1. **Get it in writing.**

The single biggest gap in Nexus's position was the absence of any written employment agreement addressing IP ownership. Section 13(3) of the *Copyright Act* applies only "in the absence of any agreement to the contrary." A well-drafted IP assignment or ownership clause would clearly set out who owns what.

2. **Define roles broadly and clearly.**

The Court drew a sharp line between an employee whose job is limited to a specific project and one who has a broader mandate to innovate. In the earlier *Corso v. Nebs Business Products Ltd*., 2009 CanLII 11215 (ON SC) decision, the employer won its copyright claim because the ideation and development of new products was an integral part of the employee's duties. In *Krougly*, the employee's role was confined to working on one existing product, and he was told not to work on other products. Employers should carefully consider the employee's intended role and ensure that job descriptions and employment agreements reflect that expectation.

3. **Implement clear IP and acceptable use policies.**

Even with a solid employment agreement, it helps to have workplace policies that set expectations around IP creation, the use of company resources, outside ventures and the obligation to disclose inventions or works created during the employment relationship. These policies reinforce contractual protections and help build a culture of transparency.

4. **Understand employer rights and remedies available.**

Employers facing a situation like Nexus's should consider the full range of available remedies, including breach of loyalty, breach of fiduciary duty, misappropriation of confidential information, breach of non-competition or non-solicitation covenants and unjust enrichment, as appropriate. A multi-pronged legal strategy is often necessary.

5. **Audit your agreements regularly.**

Roles evolve. An employment agreement drafted years ago may no longer reflect what an employee actually does today. Regular reviews of agreements, job descriptions and IP policies help ensure that an employer's contractual protections keep pace with reality.

The Bottom Line

Nexus Solutions Inc. v. Krougly is a reminder that the application of protections under the *Copyright Act* should be carefully considered in the context of each specific employer-employee relationship. For the purposes of section 13(3), "work made in the course of employment" extends only to works created within the scope of an employee's actual responsibilities, not to everything they are capable of producing.

With respect to works created by employees, clear employment agreements, robust IP clauses or agreements and well-communicated workplace policies could close the gap between an employer's expectations and reality.

The good news? These are all things you can put in place today.

For more information or assistance with IP-related employment matters, please contact Sarah Mills and Rae Daddon. Rae is an intellectual property and regulatory lawyer who helps clients protect and maximize the value of their IP assets.

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