The Creative or Collecting Testator – the artist, the collector and the inventor[1]

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Unlike previous discussions, these last few pages consider the issues from a time-point after the death of the testator, that is, the administrative side of the practice. It is hoped that this will also equip the estate lawyer with a useful perspective in the planning and drafting exercise.

An Extremely Simplistic Primer on Intellectual Property

This discussion bears principally on testators who own assets which may be the products of their own minds and labours, or those of others, but which have special value because of their uniqueness. Most of the discussion has to do with their value as intellectual property, with some brief discussion of tax issues.

A "quick once over" of intellectual property law is in order. (The author begs the forgiveness of patent, trade-mark and copyright colleagues for daring to reduce their complex fields to a few paragraphs.)

There are three principal branches of intellectual property law– patents, trade-mark and copyright. There are some less common branches, as well as some related concepts, which will be mentioned.

A patent is, in essence, a time-limited exclusivity given to an inventor by the government in exchange for the inventor "laying out" his invention in a fashion that a person skilled in the subject matter could

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reproduce. Crudely put, the inventor reveals the “recipe” in exchange for an exclusive right to execute the recipe for a fixed period of time. Patents have to do with “how to” and represent the distilled thought process of the inventor. They are handed out by the Patent Office only when the inventor has persuaded the Office that he or she has created something which is “novel” and otherwise satisfies the strict statutory requirements.

A trade-mark is, in essence, a brand. It may be a name, it may be a logo, it may even be a sound, but in every case the object of registering a trade-mark is to give the owner some advantage in the marketplace, some instant and happy recognition, whether the Golden Arches, the various Coke logos, or a stylized Apple. Trade-marks are very jealously earned and guarded. Like patents, they are an exclusive government license to use and protect, but unlike patents, you do not have to demonstrate “how”, you simply need to prove that you have exclusively used the mark and that it has sufficient uniqueness and association with the goods or services. (There is much more, of course, but bear in mind this is a primer!)

Copyright is entirely different. While you *can* register a copyright, which will give certain additional statutory protection, you need not do so. Copyright is the automatic right of the creator of literature, art, music, computer code, architectural drawings, cinematography, theatre, or any other art form, to legal protection from being “copy-catted”. In fact, this very paragraph enjoys copyright, as I am writing it! Although the © symbol is useful for enforcement purposes, it does not create copyright– it simply amplifies its protection. Copyright arises automatically upon my singing an original song for the first time, my writing the lines of code, my production of plans for a building, or whatever creative work may flow from my mind. As you may imagine, copyright is the most slippery of the three main areas of intellectual property law.

Before leaving the discussion of copyright, let us take a quick tour of the important concept of "moral rights". A moral right is the enforceable right of a work's creator to stop anyone, including someone to whom he has sold his copyright, from treating the work in such a way that would bring scorn or discredit upon the author. Thus, although Mr. Snow had sold his Canada Geese sculptures to the Eaton Centre, he could still prevent the owners from tying cute (and in the mind of the sculptor, demeaning) little red Christmas ribbons around their outstretched necks.[2] Your creative client may, therefore, have composed and sold music, but also wants to be sure that after his death his heirs will continue to protect his, and the family's, dignity.

There are several less common areas of intellectual property law which are mentioned only for the sake of awareness. Industrial design and printed circuits fall somewhere among copyright, trade-mark and patent, and plant breeders' rights are "sort-of-patents" which are too unique to bring under the *Patent Act*.

Related in many ways to intellectual property law is e-business law, including domain names and online business models. The internet has brought a myriad of new kinds of assets into play for the estate planning lawyer, such as points in loyalty programs ("Air Miles" and the like), passwords to online accounts and forums and even forms of currency and money exchanges such as Bitcoin and PayPal. We need to be aware, as well, of the online alter egos of many testators whether in such fora as LinkedIn or Facebook or in more obscure fora where the client will live anonymously behind an avatar of some sort. This important discussion has been canvassed fairly extensively[3].

Finally, in terms of broad-strokes", one needs to bear in mind that intellectual property is country or

2*Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.)

3 For example *"Hard Drive or Overdrive– Dealing with Digital Assets Under Powers of Attorney and Wills"* Debenham, David: 19th East Region Solicitors Conference, Tab 3C.

region specific, and many owners will have registered or otherwise protected beyond Canada's borders. If the client's intellectual property is (at least in the mind of the testator) of significant value, the drafting lawyer may wish to propose that an opinion be obtained as to offshore implications of the death of the owner.

The Devolution of Intellectual Property

As will be discussed below, the passing of Intellectual Property upon the death of the testator generally follows the normal rules of devolution. However, there are many finicky nuances and the testator may therefore want to consider naming a separate executor and trustee with specialized knowledge in the field.

Patents

A patentee may bequeath a patent or the right to obtain a patent by will, and in the absence of such a bequest the patent will be granted to the personal representatives of the estate of a deceased inventor.[4]

Copyright

On the death of the author, copyright vests in the personal representatives of the author.[5] In particular, it should be noted that the estate retains rights to any reversionary interest after twenty-five years.[6] It

4 *Patent Act*, R.S.C. 1985, c. P-4, s. 49(1).

5 John S. McKeown, Fox on Canadian Law of Copyright and Industrial Designs, 4th ed (Toronto: Thomson Reuters Canada, looseleaf, updated 2016)

6 *Copyright Act (R.S.C., 1985, c. C-42* s14. (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, otherwise than by will, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

should also be noted that moral rights devolve according to the will or intestacy of the owner of the moral rights.[7] The practitioner should also note that copyright and moral rights (in most cases) continue to run for fifty years after the death of the creator of the work,[8] as a result of which the executor should plan accordingly with respect to the economic value of the work.

Trade-marks

Ownership of a trade-mark passes in the same manner as most other personal property. There are, however several time-related issues of which the executor or trustee should be aware. First, a trade-mark must be renewed each fifteen years,[9] and the executor should therefore ensure that the new owner is made aware of the relevant date. In the same way, the successor owner should be warned that if the trade-mark goes into disuse as a result of the owner's death, it will be at risk of expungement after three years.[10]

Licenses

A good deal of Intellectual Property is monetized and controlled through licensing. The executor, as part of bringing in the estate, should therefore search for all instances where the deceased was a licensee or a licensor.

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7 *Copyright Act (R.S.C., 1985, c. C-42):*

> s.14.2(2) The moral rights in respect of a work pass, on the death of its author, to
> (a) the person to whom those rights are specifically bequeathed;
> (b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or
> (c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate.

8 *Copyright Act (R.S.C., 1985, c. C-42) s.6*

9 *Trade-marks Act (R.S.C., 1985, c. T-13)* s. 46

10 *Trade-marks Act (R.S.C., 1985, c. T-13)* s.45

Domain names, online accounts, passwords.....

There are four factors which will bear on most such property. First, in that they are relatively new, there is little developed law to offer guidance. Second, they are governed principally by contract and to a lesser extent by nationally-appointed governing bodies such as the Canadian Internet Registration Authority (CIRA). Thirdly, much more often than not they operate across provincial and national boundaries, and conflict of laws is nearly always a relevant issue. Finally, the use of passwords is prevalent in online activity, thus limiting the opportunity of an executor to follow up online assets in the absence of knowing the relevant password.

Tax issues

Before leaving the discussion, practitioners need to be aware that there will be different tax issues related to intellectual property. Generally, if the property is held as part of a collection, such as a piece of art, it will likely be "personal use property" or "listed personal property", the tax treatment of which is somewhat different than the usual treatment of capital property. On the other hand, if the property is used or intended for income purposes, it is more likely to be capital property. Suffice to say that the executor and his advisor will want to avoid stumbling into unfamiliar territory and will seek good tax advice.

Summary

A surprising number of our clients will own Intellectual Property, whether as authors, inventors, business persons or collectors. Such property is typically much more nuanced than such tangibles as real estate or investments and it is important that we take the time to discover such property and assess if special treatment is needed in our estate planning, or our estate administration.