

Legal Issues Regarding Oral Histories

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When I was asked to discuss legal issues relevant to oral histories I thought the topic would be straightforward. In fact, the subject turned out to be far more complex than I had first contemplated. I will, however, touch briefly on various rights which may arise from the creation of oral histories, with a focus on copyright, which is my area of practice. I will also discuss other claims that may be available to those providing the oral histories, whom I shall refer to as orators, such as breach of confidence, slander and libel, and invasion of privacy. The extent to which copyright or any other rights may be available to oral historians or to orators is not clear. As is true with most legal issues, each case will be governed by its facts. However, an awareness of the general legal principles which apply, should assist oral historians to develop agreements with orators which recognize each party's rights and limit the historians' liability for third party misuse.

General Copyright Principles

I turn first to copyright protection. To my knowledge, no Canadian case has directly addressed the subsistence of copyright in an oral history, but applying general principles set out in our Copyright Act, it is likely that one or more copyright arises when an oral history is created.

By way of background, the Copyright Act grants creators of original dramatic, literary, musical and artistic works, and owners of mechanical contrivances, (i.e. records, tapes, movie soundtracks or other audio works) the right to control the works' reproduction in any material form. The owners of copyright protected works, other than mechanical contrivances, also have the right to publish the work, convert it or adapt it into another type of work, for example a novel into a film, to perform the work in public, or to authorize third parties to do any of these acts.

Dramatic and literary works are defined broadly to include respectively recitation pieces, choreography, scenic arrangements or acting forms and compilations of information, tables and computer programs.

Copyright arises automatically in Canada at the time the work is set in a fixed form, such as a manuscript or a film negative. At this point, the work becomes a tangible form of expression capable of protection rather than an abstract idea in which no one can claim a monopoly. The fixed work must also meet a minimum level of originality to be considered a work of authorship. In Canada, the required level of originality is quite low, in that the work must constitute a small degree of intellectual labour and skill by the author and not be copied from another's work. For example, instruction sheets, text for packaging and a schedule of horse races have all been accorded copyright protection although of little originality.

Generally, the author of the work owns the copyright, although there are exceptions; most notably, employers own copyright in works created by full-time employees within the scope of their employment.

How do these principles apply to an oral history? The questions that must be asked are:

1. Does the history qualify as a "work," because it constitutes a work of authorship and has been sufficiently fixed? and
2. If so, who can claim the copyright?

To answer these questions, you have to examine the nature of oral histories. They are to a great extent a spontaneous and free-form telling of events and anecdotes by the orator in response to the questions of the historian. Some structure is likely imposed on the direction of the history by the historian, who may have previously prepared a series of written questions. In many cases, though, the historian will ask additional spontaneous questions during the course of the interview on the basis of the orator's answers. The finished product, then, is a combination of spontaneous and random

responses arising from a loosely arranged written structure. The history itself is preserved on audio or video tape from which a printed transcript may then be produced. Does this qualify as a work?

Canadian courts have recognized that a dramatic work which contains a certain degree of improvisation in its performance remains protectable.¹ Compilations of facts and examination questions are clearly protectable as literary works, therefore, to the extent that an overall structure for the oral history exists, namely the interview questions, I believe it is reasonable to argue that the resulting material put on tape could qualify either as a literary or dramatic work, although no case law has definitively established this point.

Copyright would also subsist in the sound recording of the history as a mechanical contrivance. This constitutes a second layer of copyright, separate from that arising in the material embodied on the contrivance. The term of copyright in the contrivance is fifty years from the date on which the original master recording is made, and only permits the owner the right to control any copying of the tape, but not its public performance. For example, if a legally purchased recording was played at a public seminar or over the radio, it would not infringe the owner's copyright in the recording although it could infringe the performance right in any protected material recorded on the tape, such as a musical composition.

The next question, somewhat intermingled with the issue of whether a oral history is a work of authorship, is whether it is sufficiently fixed as a medium of expression to attract protection. The interview by the oral historian will be fixed to some extent on paper when a list of questions is compiled. A second fixation of the questions occurs when the interview is recorded on tape. This is the only form of fixation, however, for the orator's responses.

Under our present Copyright Act, it is unclear whether fixation on tape of a spontaneous utterance creates a copyright in those words. Even if the words of the speaker are sufficiently original to be considered a work, as will be discussed below, they must be fixed in a manner recognized by the Act. For example, dramatic works under the statute must be fixed "in writing or otherwise." Literary works are traditionally fixed in writing as well.

The question remains whether the relatively antiquated language of the Copyright Act can be stretched to encompass other forms of fixation which are commonly used to preserve works in this age of rapidly changing technology. For example, the Copyright Act was recently amended to provide that live television programs which are recorded on videotape simultaneously with their broadcast will be sufficiently fixed to qualify as a work for which cable

retransmission royalties may be claimed.² There are numerous other examples of non-traditional methods of "fixing" a work. For example, books, speeches and essays can now be composed at computer terminals with the text being preserved on software disks. Although it is possible to produce a paper copy of the work, in practice it is quite possible that several drafts of a manuscript will be edited on the terminal screen and never reduced to paper. Choreography is now being created without traditional paper notation by videotaping the dancers in rehearsal with the choreographer.

It is also interesting to note that in 1988 the United Kingdom Copyright Act, an earlier version of which served as the model for the Canadian Act, was amended to state that "literary works" means "any work which is written, spoken or sung"³ and that "copyright does not subsist in a literary work unless and until it is recorded, in writing or otherwise."⁴ Copyright experts have interpreted these changes to mean that copyright will subsist in extemporaneous speeches, if they are original and recorded at the time they are made.

In light of these changes, it is likely that the Canadian Act will have to be interpreted or amended in such a way as to protect literary and dramatic works fixed in non-traditional ways.

Assuming, then, that an oral history is a work which has been sufficiently fixed, who would own the rights? Copyright in the interview questions and in the recording, would be owned by the oral historian or his/her employer. As author of the interview format, he/she would clearly own copyright, unless a full-time employee of another person or entity, in which case the employer would own the copyright.

Furthermore, the Copyright Act provides that the owner of a recording is the person who owns the original plate from which the recording is first made. Again, this may be the oral historian who owns the audio or video cassette, or it could be the historian's employer who buys the tapes for the historian's use.

Finally, if the historian makes a paper transcription of the recording, which entails editing and correcting the interview, copyright may arise in the transcript and be claimable by the historian.

The terms of these copyrights differ. Copyright in the interview and the transcript would subsist for the life of the author plus fifty years, whereas copyright in the recording subsists for fifty years from the date on which it is made. During these terms, any unauthorized copying of the tape in whole or substantial part would infringe both copyrights, for which the historian could claim damages and an injunction. It is important to note that ownership as determined by the Copyright Act can always be changed by written assignment.

In summary, oral historians likely expend sufficient labour in preparing their questions and recording the resulting interviews to claim copyright in the recordings and perhaps in some of the underlying material. In fact, a 1985 report on copyright reform, *A Charter of Rights for Creators*,⁵ suggests that oral histories would be protected as sound recordings, and therefore further amendments to the Act were not necessary to permit historians to control use of their histories. Therefore, even under the present law, oral historians have sufficient rights to control reproduction by third parties of their tapes. It is more speculative whether they can also control use and reproduction of the content of the interview in the event there is no copying of the actual recording but only of the material on the recording.

The more difficult issue is whether the orator could also claim copyright in his/her words which could be exercised against both the historian and third parties. Traditional Canadian copyright policy indicates protection should not extend this far, because the orator's words, being spontaneous and random, constitute ideas rather than a "work" of intellectual labour and skill. However, given that our Act is likely to be amended in the near future, and that copyright in recorded words has not been expressly rejected by the courts, it is not outside the realm of possibility that an orator could bring such a claim to present subsequent reproduction of his/her words by either the historian or by researchers using the historian's materials.

First, the orator would have to prove that his/her conversation is sufficiently fixed to attract protection, I'm assuming that unless an interview questionnaire has been forwarded to the orator prior to the interview, he/she will not be relying on any preparatory notes or text when responding. Therefore, the orator would clearly have to rely on a broader concept of fixation as discussed above which would protect the words if recorded on tape simultaneously with their delivery.

The second hurdle would be to prove that spontaneous conversation, even if fixed, is a work of authorship and not just random thoughts in which no monopoly should be granted. As Canadian law has not analysed this point, I reviewed two other jurisdictions.

The United Kingdom

As mentioned, the U.K. Act as amended seems to infer that spontaneous spoken words, if recorded, attract copyright protection. Not only has the definition of a literary work been expanded to include spoken words, but a statutory exemption from infringement has been included in the 1988 U.K. Act.⁶ The exemption permits third parties to use a person's spoken words once recorded for specific purposes without infringing copyright. Surely, this section would not have been necessary unless it was possible that spontaneous speech

could constitute a copyrightable work under British law.

Specifically, the exemption provides that where a record of spoken words is made, in writing or otherwise, for the purpose of (a) reporting current events, or (b) inclusion in a broadcast or cable program, it is not an infringement of any copyright in the words as a literary work to use the record or material taken from it, or to copy the record, or any such material, and use the copy for that purpose. The intent of this section seems to be to prevent an orator from restraining further use by others of his/her words, recorded as part of either a report of a current event or a broadcast or cable program, for the same purposes. However, by inference, unauthorized use of the words for any other purpose, such as private research or inclusion in a commercially published book, would constitute infringement of the orator's copyright.

The exemption also specifies that the record of the words may not be used if the orator, prior to his/her words being recorded, specifically prohibited either the making of the recording or further use of the recording by third parties.

Also the exemption from infringement only appears to apply to use of the recorded words. Therefore, permission to use or copy the actual record, be it a transcript or an audio recording or a film, would have to be sought from the rights holder. Applying this exemption to oral histories, it would appear that in Britain an orator, who grants an interview as part of a broadcast or a report on a newsworthy topic, without stipulating any restrictions as to its use, cannot enforce a copyright in the responses, although the historian who makes the record would have the right to authorize use or reproduction of the record by third parties.

The United States

The United States courts have dealt with the protection of recorded words in at least two decisions. Caution must be used, however, in directly applying their reasoning to Canadian law, as there are significant differences between each country's copyright statutes. Most notably, until recently the U.S. recognized commonlaw copyright in certain works, that was not governed by their statute and therefore the works did not need to be "fixed" as a prerequisite to protection. Furthermore, the U.S. statute has a much broader definition of how a work may be fixed. However, on the issue of what constitutes authorship of a work, the cases may be of value.

In the first case,⁷ the writer Ernest Hemingway had a friendship with a less well-known writer, A. E. Hotchner. Over the years, Hemingway had many conversations with Hotchner about life and writing which were carefully documented by Hotchner. During

Hemingway's lifetime Hotchner wrote many articles that incorporated these conversations, and Hemingway made no objection. After Hemingway's death, Hotchner wrote a full biography entitled *Papa Hemingway: A Personal Memoir*, which extensively used portions of their conversations.

Hemingway's widow brought an action against Hotchner on a number of grounds, including that use of the conversations infringed Hemingway's commonlaw copyright.

A preliminary injunction restraining publication of the book was denied by the New York Supreme Court. It held that commonlaw copyright could not exist in spontaneous oral conversations on a number of grounds, including that to provide such protection would unduly impinge on the constitutional right to free speech, and that a conversational exchange was the result of more than one participant, and therefore could not be solely the work of one individual.

The trial court agreed, holding that conversations were the product of interaction between parties and were not individual intellectual works. Therefore, the Court stated, any one participant should have the right to publish the conversation, verbatim or otherwise.

Hemingway's widow appealed the decision to the New York Court of Appeal. This court concurred with the Trial Division in the result by not granting relief. However, their reasoning left it open for another court to find commonlaw copyright in conversations.

The court did not determine whether copyright existed because even if it did, they felt the evidence showed that Hemingway had consented to publication of his conversations by not objecting during his lifetime. The court, however, did not preclude the possibility of protection for conversations, provided such right would not unduly fetter freedom of speech. Mr. Justice Fuld stated:

The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

The rules of commonlaw copyright assure this freedom in the case of written material. However, speech is now easily captured by electronic devices and consequently, we should be wary about excluding all possibility of protecting a speaker's right to decide when his words, uttered in private dialogue, may or may not be published at large. Conceivably, there

may be limited and special situations in which an interlocutor brings forth oral statements from another party which both understand to be the unique intellectual product of the principal speaker, a product which would qualify for commonlaw copyright if such statements were in writing. Concerning such problems, we express no opinion; we do no more than raise the questions, leaving them open for future consideration in cases which may present them more sharply than this one does.⁸

The same issue arose in the United States more recently, in the case of *Jerry Falwell v. Penthouse International Limited*.⁹ The evangelist Jerry Falwell brought an action against *Penthouse* magazine and the reporters hired by it, claiming that *Penthouse's* publication of an interview with him infringed commonlaw copyright in his conversation.

The court rejected that any commonlaw copyright existed in spoken words, stating that the existence of such a right had never been established by a court. Mr. Justice Turk again stressed that recognizing such a right would run contrary to freedom of speech. He stated:

However different or unique plaintiff's thoughts or opinions may be, the expression of those opinions or thoughts is too general or abstract to rise to the level of a literary or intellectual creation that may enjoy the protection of copyright. Although the general subject matter of the interview may have been outlined in the reporters' minds prior to their meeting with the plaintiff, the actual dialogue, including the unprepared responses of plaintiff, was spontaneous and proceeded in a question and answer format.¹⁰

On balance, then, the U.S. courts have been reluctant to recognize copyright in conversations. The *Hemingway* case suggests that rights in a conversation may arise in specific circumstances, but does not delineate what those circumstances would be. On the other hand, the *Falwell* case seems to deny protection for spontaneous conversations.

In summary, then, it remains doubtful that in Canada an orator has an enforceable copyright in his/her words. The U.K. law seems to favour rights for orators, the U.S. law does not. To the extent that the orator can show that the taped conversation was not totally spontaneous, but resulted from prepared answers or notes, it may be possible for him/her to lay some claim to rights in the interview as a literary work.

In addition, if the interview includes a recitation of an oral story or legend which may have been

communicated verbally from one generation to another in a set form, it could be argued, that once fixed on the recording, a copyright arises because the story is not random but a structured series of words never before preserved. As author of that particular "telling" of the story, the orator could perhaps claim the copyright.

A policy consideration against granting a copyright would be an undue restriction on freedom of speech.

Given the ambiguity of the current law, oral historians should take steps to protect themselves against potential claims. I would therefore recommend that a well-drafted agreement between the oral historian and the orator be signed before the interview takes place. The agreement should stipulate that all rights, including all copyright in the interview, are to be owned by the oral historian and it should include an assignment of any rights which may, by operation of law, vest in the orator.

Furthermore, the orator should agree that in future he/she will execute any further confirmatory assignments that may be required to transfer all rights to the historian. If an assignment is not possible, there should at the very least be a waiver of any copyright claim by the orator.

You should also be aware that under the Copyright Act, authors are entitled to moral rights in their works, in addition to and separate from the copyright.¹¹ Broadly defined, moral rights enable authors to prevent unauthorized changes to their works which would have a detrimental effect on their reputation. In Canada, they also enable authors to prevent any unauthorized use of their works in association with an institution, product or service which may also reflect poorly on their reputation. Moral rights, like copyright, subsist for the life of the author plus fifty years and therefore can be bequeathed to the author's heirs as part of his/her estate.

If the orator's contribution to the interview is not a work, no moral rights will arise. However, if a Court should find that the orator's responses qualify as a work, the orator would also have moral rights. Theoretically, then, the orator could prevent an oral historian or researcher from editing or otherwise altering portions of the oral history without his/her consent. Moral rights could even impact on the historian's ability to transcribe the oral history. Accordingly, it would be prudent to also include in an agreement a waiver of moral rights. The Act stipulates that, unlike copyright, moral rights cannot be assigned by the author, but can only be waived.

I hope I have shed some light on the potential copyrights that may arise from the creation of an oral history, and who may control these rights.

Slander and Libel

I turn now to a brief discussion of other possible claims available to an orator, beginning with the law of slander and libel. Slander and libel originated as commonlaw tort actions, designed to protect a person's reputation. In most provinces, including Ontario, there are now statutes which set out the parameters of the claim.

A complainant must establish that a statement has been made which was defamatory, that it referred to the complainant, and that it was published.

A statement will be defamatory if it is a false statement about a person which discredits him/her in the eyes of right-thinking members of society generally. In applying this definition, an objective standard is applied. In other words, would the statement put the person in disrepute in the eyes of the average, reasonable reader?

The Words are given their ordinary, natural meaning in determining whether they are defamatory, although the concept of innuendo can be applied. Under this concept, even if the words in their ordinary and natural meaning are not damaging to the complainant, if they are published and the publisher knows certain extraneous facts about the complainant's life which colour the ordinary meaning of the published words, such words may be defamatory by innuendo.

In order to prove that there has been a publication, it must be shown that there has been a communication of the statement to one other than the complainant. The breadth of the publication only affects the measure of damages.

Generally speaking, written statements are categorized as libel, and oral statements as slander. The action is personal, which means that only the person defamed has a right, and this right in most cases is extinguished upon his/her death.

Proper defendants are those persons who contributed or participated in publication of the defamatory statement. In some instances there will be more than one participant, including an interviewer, a reporter, a newspaper editor and a newspaper publisher. In some cases, secondary players such as distributors or lenders of publications may also be liable, but only if they actually knew of the libel or could, by reasonable care, have discovered it.

Certain defences are available such as justification, that is, if the statement is true it is not libellous, no matter how damaging; and "fair comment," namely the published statement constitutes a comment honestly made on true facts concerning a matter of public interest. If actual malice by the publisher can be shown, a fair comment defence will not succeed.

Libel claims could arise out of the use of oral histories in at least a couple of ways. First, the orator could complain if a researcher uses the oral history as part of

another publication which is defamatory. In this situation, the historian may not be liable because he/she has not participated in the defamatory publication. Presumably, the original oral history was given voluntarily by the orator for research purposes. The mere supply of the tape to a third party who then uses it without the historian's knowledge as part of a defamatory publication may be too indirect a link to make the oral historian a participant in the tort. Applying the test for secondary participants discussed above, a historian might become liable if he/she actually knew the subsequent publication would be libellous, or could with reasonable care have discovered the libel.

Perhaps a greater risk exists that, in the course of an interview, an orator may make an untrue and defamatory statement about another party. In such case, if the tape is then circulated to researchers, the other party may sue not only the original orator, but also the oral historian, alleging that by making the tape and circulating it, he/she has participated in a defamatory publication.

It is likely impossible to preclude the risk of libel actions. The interviewer must assume that the orator will only make true statements. However, to minimize the risk, any written agreement with the orator should include an indemnity in favour of the oral historian against any defamation actions that may be commenced based on false statements made by the orator.

Breach of Confidence

An orator might also claim that use by third parties of the oral history constitutes a breach of confidentiality between the orator and the historian. The law of confidence protects not only information concerning marketable ideas or inventions, but also personal information which would embarrass the discloser if it was publicly circulated.

The orator would have to show that the information was disclosed within the bounds of a confidential relationship. Because the interview was granted voluntarily for research purposes, this point may be difficult to establish. Certainly, the orator should be made aware before the interview is conducted of the potential uses for the tape and be given an opportunity to stipulate any restrictions that should apply to its use.

If the agreement with the orator stipulates that a confidential relationship does not exist between the parties, and that the history may be given to third parties, a breach of confidence action would fail.

Alternatively, the agreement could permit the orator to specify a time period within which the information would be kept confidential. Once such period expires, the obligation of confidentiality would no longer exist.

Invasion of Privacy

Finally, an orator might complain that use by third parties of the oral history invades his/her privacy.

Invasion of privacy has been recognized in Canada as a commonlaw tort called "misappropriation of personality." In some provinces, the action has been codified in Privacy Statutes. The tort has two aspects: 1) it is an offence to invade a person's privacy or solitude, causing mental suffering; and 2) it is unlawful to make an unauthorized use of a person's (usually a famous person's) likeness or name for commercial purposes.

The first aspect, an invasion of one's solitude, would seem more applicable to the use of oral histories. For example, in the case of *Dowell, et al. v. Mengen Institute et al.*,¹² the plaintiffs were participants in a conference concerning unemployment. The Mengen Institute, one of the defendants, was preparing a documentary on the subject, and the participants, before being filmed, signed a waiver stating that they granted the Institute the right to "portray me, use my words, name or likeness in a documentary."

The conference became an encounter session with psychiatrists, in which the plaintiffs became quite emotional on camera. Accordingly, they then wished to revoke their consent and to restrain publication of the film on the basis that it made them appear seditious and unbalanced.

The court expressly recognized the right to so protect one's privacy, but held that in this instance the plaintiffs were restrained from bringing an action because of the consents.

Therefore, if an agreement with an orator stipulates that the oral historian and any researchers authorized by him/her has a right to use that person's words and name, a privacy claim would likely be defeated.

In addition, some of the provincial Privacy Statutes recognize defences similar to that raised in defamation actions. Therefore, if the orator claiming the invasion of privacy is a public figure, and if the history concerns issues of public interest, fair comment may be permissible and preclude a privacy claim.

Finally, a privacy action is personal, and extinguishes upon the death of the person whose privacy has allegedly been invaded.

In conclusion, an oral historian should be aware of the rights that he/she may exercise over the works created, as well as those claimable by orators. If potential complaints can be anticipated and referred to in appropriate agreements, disputes can hopefully be avoided.

Notes

1. *Kantel v. Grant, Nisbet & Auld Ltd.*, [1933] Ex. C .R. p. 84 .
2. *Canadian Copyright Act* R.S.C. 1985, c. C-42, s. 3 (1.1) . (Butterworth Canada Ltd.'s Office Consolidation).
3. *United Kingdom Copyright, Designs and Patents Act*, 1988, s. 3 (1).
4. *United Kingdom Copyright, Designs and Patents Act*, 1988, s. 3 (2).
5. *A Charter of Rights for Creators*. Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, October, 1985.
6. *United Kingdom Copyright, Designs and Patents Act*, 1985, s. 58.
7. *Estate of Ernest Hemingway, et al. v. Random House, Inc. et al.* 53 Misc. 2d 462, 279 N.Y. s. 2d 51 (S.C.), affirm'd 29 A.D. 2d 633, 285 N.Y.S. 2d, 568, (S.C. Appellate Division), affirm'd 296 N.Y.S. 2d, 771 (C.A.).
8. *Ibid*, p. 778.
9. *Jerry Falwell v. Penthouse International Limited* 521 F. Supp. 1204 (1981) (U.S. District Ct.).
10. *Ibid*, p. 1208.
11. *Canadian Copyright Act* R.S.C. 1985, c. C-42, ss. 14.1, 14.2, 28.1, 28.2 (Butterworth Canada Ltd.'s Office Consolidation).
12. *Dowell et al. v. Mengen Institute et al.* (1983) 72 C.P.R. (2d), p. 239 (Ont. High Ct.) .