

Employer or Employee: Who Owns the Copyright?

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The Ontario Court of Appeal recently released its decision in [Nexus Solutions Inc. v. Krougly](#), addressing the ownership of copyright as between employer and employee and whether a work has been made "in the course of employment."

The Court ultimately held that the employee was the owner of copyright in the software at issue, even though he had secretly developed it while employed by Nexus Solutions Inc. and the software competed with Nexus's intellectual property. In reaching this conclusion, the Court relied on two key facts: 1) the employee had not been asked to create the software at issue; and 2) Nexus had not expended any resources in developing the software.

This case is a clear reminder for employers seeking to protect their intellectual property rights. Employers should carefully consider what work and activities are within the scope of their employees' duties and which resources and materials are being used in the creation of new content. Further, employers should ensure they have written agreements in place that clearly address copyright ownership for works produced by employees and what type of work (if any) is permitted outside normal work hours.

Background

Nexus, a software development firm, brought an action against its former employee, Vladimir Krougly for copyright infringement.

Nexus develops and markets a continuous emissions monitoring software product called CEMView. Krougly developed a competing product called Limedas while employed by Nexus and marketed it to some of Nexus's customers following his resignation. Nexus sought a declaration that it owned the copyright in Limedas, because Krougly had created it in the course of his employment at Nexus, and that Krougly and the other defendants had infringed Nexus's copyright in CEMView. Krougly defended by asserting that he created Limedas independently.

Under s. 13(3) of the [Copyright Act](#) (the Act), an employer is the first owner of copyright in a work authored by an employee in the course of employment, under a contract of service, subject to any agreement to the contrary. That is an exception to the general rule in the Act, which is that the author of a work is the first owner of copyright in it. The supporting rationale for the s. 13(3) framework is that employers assume the major financial, organizational, and other risks involved in the creation of works made in the course of

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employment, while the employee receives compensation in the form of a salary or other agreed remuneration.¹

Courts may consider various factors in assessing whether a work has been created in the course of an employee's employment, including the terms of the contract of employment, where the work was created, whether the work was created during normal working hours, who provided the materials for the work to be created, the level of direction provided to the employee, whether the employee can refuse to create the work, and whether the work is "integral" to the business.²

The Lower Court Decision

The trial judge considered the purpose and the factors used to determine the scope of an employer's rights under [s.13\(3\)](#) of the Act, including expert evidence.

On infringement, the trial judge found that CEMView and Limedas had similarities, but that Krougly did not copy any substantial portion of CEMView. The similarities were in respect of non-protectable ideas, such as the intended functionalities of the programs, and there were substantial differences including in relation to the source codes, algorithms used, and data acquired.

On the ownership of copyright in Limedas, the trial judge held that Krougly did not create Limedas in the course of his employment with Nexus and dismissed the action. In support of this decision, the trial judge found:

- Krougly worked on Limedas outside normal business hours and did not use Nexus's property to do so;
- Nexus did not permit Krougly to create any other software for Nexus without receiving authorization and Krougly's employment would have been terminated if Nexus knew he was developing Limedas;
- Krougly also did not have a written contract of employment and there was no agreement that prohibited him from working on his own projects on his own time or allocated ownership of what he created;
- Nexus did not ask Krougly to develop software akin to that used by Limedas, and although related to his work at Nexus, Limedas was clearly a side venture;
- Nexus did not expend resources for the development of Limedas; and
- Nexus did not assume any risks involved with Limedas.

The trial judge noted that Nexus may have other remedies available to it, but the purpose of copyright law is not "to punish bad actors simply because their actions may run afoul of their duties towards their employers."³ Cassels has previously written about the trial decision, in our summary of notable copyright decisions from 2025, a copy of which can be [found here](#).

On Appeal

Nexus argued that the trial judge erred in three ways: (1) by requiring Nexus to show it had specifically directed Krougly to develop the software at issue before it could succeed in claiming copyright pursuant to s. 13(3) of the Act; (2) by giving weight to whether Nexus had bargained for or otherwise expended resources to gain the rights in Krougly's works; and (3) by finding that Krougly had not been sufficiently directed to create the software at issue.

The Court of Appeal dismissed the appeal and held that the trial judge made none of those errors.

On the first ground, Nexus submitted that the proper question was whether a specific work made by an employee falls within the general class or kind of work the employer could direct the employee to make. The Court did not accept this argument and agreed with the trial judge's interpretation. It emphasized that whether a task falls within the course of an employee's employment depends on whether the employer has actually assigned responsibility to the employee to carry out the task or perform the function in question.⁴

On the second ground, the Court stated that Nexus had misconstrued the point the trial judge was trying to make. The fact that Nexus did not expend resources to support developing Limedas was a factor to consider, not a requirement, and therefore the trial judge did not err as Nexus argued.⁵

On the third ground, Nexus argued that the development of a next-generation software was part of Krougly's employment responsibilities. The Court found that the evidence showed at best that Nexus intended to develop a next-generation product at some point and that Krougly's role at Nexus was limited to the development of CEMView.⁶

"In the Course of Employment"

Ultimately, the appeal turned on the meaning of "in the course of their employment" in s.13(3) of the Act. The Court interpreted this section as premised on the determination that the employer ought to hold copyright over works made by the employee as part of their responsibilities to the employer, since the employee was paid to make the work and did so in fulfillment of their agreed-upon role with the employer.

The Court stated that, where an employee made the work under the employer's instructions using the employer's resources, s.13(3) of the Act would apply. However, where an employee made the work on their own time, with their own resources, and not as part of their assigned duties or responsibilities, copyright would vest in the employee. The Court would also consider whether any agreement to the contrary between the employer and employee existed. The Court summarized that the "overriding issue is whether the making of the work in question is something that the employee was asked or expected to do, either expressly or by necessary implication, as part of their employment responsibilities."⁷

Conclusion

This decision clarifies how the courts interpret s.13(3) of the Act and confirms the factors considered by the courts to assess whether an employee made a work “in the course of employment.” Employers should carefully consider the scope of their employees’ duties and the resources and equipment used by employees when developing new works. In addition, employers should put in place written agreements that squarely address copyright ownership for new works, whether the employee is permitted to develop new works outside of their employment, and employee obligations related to any new works. Even if an employee breaches a company policy by creating a new work on company time or using company resources, it will not necessarily follow that the new work will belong to the company if the employment agreement does not say so.

¹ *Canadian Intellectual Property Law* (2025), [2022 CanLII Docs 4489\[1\]](#), at pp. 62-63.

² *Nexus Solutions Inc. v. Krougly*, [2026 ONCA 199](#), paras. [10-11](#) & [29](#), citing *Penhallurick v. MD5 Ltd.*, [2021] EWHC 293 (IPEC), aff’d [2021] EWCA Civ 1770.

³ *Nexus v. Krougly*, [2025 ONSC 1346](#), para. [370](#).

⁴ *Nexus Solutions Inc. v. Krougly*, [2026 ONCA 199](#), para. [34](#).

⁵ *Ibid*, para. [48](#).

⁶ *Ibid*, para. [51](#).

⁷ *Ibid*, para. [29](#).