

# Who Owns What?

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## *Copyright Ownership for Work Created in the Course of Employment*

It is a common misconception that anything created by an employee during employment automatically belongs to the employer. In reality, copyright ownership depends on a fact-specific analysis of the employee's assigned duties, the terms of the employment relationship, and the extent to which the employer funded or directed the work. These issues were central to the Ontario Court of Appeal's recent decision in *Nexus Solutions Inc v Krougly*, [2026 ONCA 199](#), in which the Court determined that a software created during Krougly's employment, but without direction or investment from Nexus, was not created "in the course" of that employment.

### **Background**

The employer, Nexus, develops and markets software that monitors and reports the compounds in smokestack emissions produced by heavy industry. Krougly was a full-time employee at Nexus, working as a senior software developer with the main task of writing source code for a software product. Outside of his normal working hours, Krougly was developing Limedas, a software that was also developed to collect, store, display and report emissions monitoring data. Following the completion of Limedas, Krougly resigned from his role at Nexus and tried to commercially market the new software, which was a rival to Nexus' product. Once Nexus realized that Limedas had been created while Krougly was employed with them, they sought a declaration from the court that Nexus had copyright ownership over Limedas, arguing that it had been created "in the course of" Krougly's employment.

In the trial decision, the trial judge considered several factors in determining whether a work has been created "in the course of" a person's employment: (1) the terms of the contract of employment; (2) where the work was created; (3) whether the work was created during normal office hours; (4) who provided the materials for the work to be created; (5) the level of direction provided to the author, (6) whether the author can refuse to create the work; and (7) whether the work is "integral" to the business. The trial judge held that Krougly himself had copyright ownership over the software.

### **Purposive Interpretation of s. 13(1) and s. 13(3) of the *Copyright Act***

In the appeal decision, the Court highlighted that statutory interpretation of the relevant sections of the *Copyright Act* (the "Act") was critical in making their decision. Section 13(1) of the Act states that "Subject to this Act, the author of a work shall be the first owner of the copyright therein." Section 13(3) states that "Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright..."

The Court emphasized that the purpose of the Act is to strike a balance between encouraging creativity by rewarding authors for their work, while ensuring that the party that assumes the financial, organizational, and commercial risks associated with creating a work is appropriately rewarded. This purposive interpretation informed the Court's analysis of whether Limedas was created "in the course

of” Krougly’s employment.

Three conditions must be satisfied for an employer to hold copyright in a work created by an employee: (1) the creator of the work must be in, in law, an employee, (2) the work must have been created “in the course of... employment”, and (3) there is no agreement to the contrary. In this case, both parties agreed on the first and third factor, so the decision hinged on whether Limesdas was created “in the course of” Krougly’s employment. In addressing this issue, both the trial judge and the Court of Appeal adopted a contextual, fact-driven approach. The question was not whether Nexus could have instructed Krougly to develop software like Limesdas, but whether doing so fell within his actual responsibilities as an employee.

Ultimately, the Court of Appeal upheld the trial judge’s conclusion – albeit “with considerable reluctance” – that Limesdas was not created in the course of Krougly’s employment. While the Court acknowledged that Krougly’s conduct raised serious concerns from an employment law perspective, including potential breaches of loyalty and good faith, it emphasized that copyright law is not intended to punish employees for misconduct. Instead, copyright ownership turns on whether the work was created as part of the employee’s assigned duties and at the employer’s initiative and risk. Absent clear contractual terms or evidence that Nexus directed, controlled, or funded the development of Limesdas, the statutory presumption in favour of author ownership prevailed.

#### **Takeaways for Employers:**

- **Use Written Employment Agreements with Clear IP provisions:** In this case, the absence of an employment agreement was significant. Clear contractual language allocating ownership of intellectual property can reduce uncertainty and help avoid ownership disputes down the line.
- **Clearly Define the Scope of an Employee’s Duties:** Nexus’ copyright claim failed in part because Krougly was not asked or required to create the software as part of his role. If employers expect employees to create copyrightable works, those expectations should be clearly set out in their job description and employment agreement.
- **Employer Investment and Control Matter:** The court will consider if the employer is expending resources for the creation of the work. Absence of funding or risk from the employer weighs in favour of the employee retaining ownership, despite the work being created on a computer or program owned by the employer.
- **Address Competition Concerns Through Contract:** This case confirms that, provided no protected work is copied and no other intellectual property rights are violated, from the perspective of copyright law, employees are generally free to develop works that compete with their employer’s products. If an employer seeks to constrain the acts of the employee, it must do so through clear contractual provisions – particularly confidentiality obligations and restrictions on the use, replication, reverse engineering, or derivation of the employer’s intellectual property and certain activities that are prohibited during the term of employment.
- **Be Cautious When Claiming Ownership Over Off-Duty Creations:** Contractual provisions assigning ownership of works created outside the scope of employment may be viewed as overreaching, especially by sophisticated employees. Where such provisions are used, they should be narrowly tailored and clearly communicated from the outset.

*The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.*

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