Healthcare Simulation and Intellectual Property

by

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Important: ***I am NOT a lawyer*** *and the following should NOT be taken as legal advice; I have written this from an artist's viewpoint. If you have any questions regarding intellectual property law consult a lawyer specializing in that specialty. You can find a lawyer by contacting the law society in your area. While I believe the information in this article is accurate, there may be errors or ambiguities within.*

Please note that a large proportion of this work was taken from a previous work I wrote on intellectual property and privacy/personality rights from an artist's standpoint. I have updated it and added additional information I believe is relevant to the healthcare simulation community.

8.0 Healthcare Simulation and Intellectual Property

Why should professionals involved in healthcare simulation, specifically Simulation Operations Specialists, be concerned about intellectual property law, privacy and personality rights, and related issues? There are a number of reasons why:

Patent infringement – Although much of simulation technology involves engineering and devices which exist outside of patent law, many simulation devices and software techniques have been patented. One case of alleged patent infringement involved the Ventriloscope®, an auscultation simulator. Lecat's Ventriloscope, LLC alleged that an employee of a simulation center infringed on at least one claim in its patent by manufacturing a device called the "Fake-A-Scope" in 2012 (Case 2:12-cv-00283-NT, United States District Court for the District of Maine). Aside from patent restrictions, the contracts and licenses that accompany simulation devices may contain clauses forbidding reverse engineering of devices.

Copyrighted material – Labels for medications may be copyrighted as are images which might be used for illustrating scenarios. The scenarios themselves are copyright material, even if posted online. In some countries, the authors also retain moral rights to their works which are independent of the copyright.

Personality and Privacy rights – ***Note:*** *Personality and privacy right are* ***not*** *intellectual property but are often confused with intellectual property rights. This is why I've included these rights in this work.*

Many cases these days are illustrated with “patient” photos. For example, in Laerdal's Sim Designer, a patient image can be inserted in the scenario. Inadvertent use of “found” portraits to illustrate cases could lead to potential problems, especially if those cases find their way onto online repositories. Learners in healthcare simulations are often recorded by audio-video equipment. Privacy rights and releases are important when recording simulations.

Serious gaming is an emerging modality in healthcare simulation. Even gaming can introduce privacy rights problems by aggregating data on individuals (see “How Labor And Data Privacy Laws Influence Gamification” by Mario Herger, Friday, 23 November 2012 retrieved from http://enterprise-gamification.com 12 Feb 2017). Be aware that data which is identifiable as belonging to an individual may be problematic if you store it.

Plagiarism

Plagiarism is the appropriation and use of the ideas or concepts of another without proper attribution. It is primarily an academic or ethics offense, usually considered a serious one in the academic world. It is different from copyright infringement in that plagiarism may only involve the idea or concept, restated in the offending author's own words. Copyright does not protect an underlying idea, only the fixed expression of that idea.

The ethics surrounding plagiarism is a gray area. Ideas and phrasing may be commonplace in some disciplines; the origin of the idea or phrase may be unknown without diving deep into the etymology. How far we should go in researching the origins of an idea, concept or phrase is often difficult to determine.

If an exact phrase or description is taken from a work, the first use of that phrase or description should be quoted and referenced. After that, the phrase or description can be used without quotes. There are three times in which you don't need to quote the phrase, but you should still reference the phrase. These are (1) descriptions or phrases from a legal transcript or ruling or (2) descriptions or phrases from a standards organization (e.g. ISO, ANSI) or a certifying or licensing organization technical standard or (3) from government legislation. The reason is that the exact phrasing is usually required; you cannot paraphrase without materially changing the meaning.

What is Copyright?

Copyright is the right to reproduce or, in the case of music or a dramatic work, perform an artistic work, publicly display a work, distribute or broadcast a work, to copy an artistic work or to create a new work derived from the original work. Copyright is sometimes referred to as a "bundle of rights." To be protected by copyright a work must be fixed; it must have a physical representation, such as an audio recording, a photograph, a painting, a sculpture or a written work.

In general, the artist or author who creates the work owns the copyright. If you are an employee **and** the work is created within the scope or course of your employment **and** there is no agreement to the contrary then the copyright belongs to your employer. The same holds true for a work created under a "work made for hire" agreement in the U.S. For employee works there is a difference between U.S. and Canadian law regarding authorship. In the U.S., the employer is considered the author of a work created by an employee during the course of employment (see U.S. Title 17, Chapter 2, § 201, Ownership of copyright). In Canada, the employee remains the author and retains moral rights in the work. In both the U.S. and Canada, in the absence of any contract stating the contrary, the copyright in a commissioned work is owned by the artist who created the work.

Registration is NOT legally required; copyright exists the moment the work is created. There are advantages to registration if you're in the U.S. Copyright maybe sold or assigned, in part or in whole, for specific media, geographic areas or time periods. When an artist dies his or her copyright is transferred in the same manner as physical property.

In the U.S. claims of copyright infringement must be pursued in Federal court and the copyright must be registered before any action can take place. Canadian courts are different in that registration is not required. Both copyright infringement and moral rights claims may be handled in small claims court.

The Purpose of Copyright

The purpose of copyright is to encourage the creation of new works of art. Canadian copyright is a descendant of the Statute of Anne, passed by British Parliament on April 10, 1710, ". . . for the Encouragement of Learned Men to Compose and Write useful Books." In the United States, the Constitution, adopted 1787, gives the government authority, "To

promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The Canadian Copyright Act encourages the creation of new works by granting control over the work to the creator for a limited period of time, after which, the work falls into the public domain. Without the ability to control and profit from a work, the artist would not have the incentive or the financial means to continue creating new works. There would also be little reason to fund or create new works of art if there was no way to prevent others from freely using an artist's creations.

What Copyright Protects

Physical possession of a work, such as a painting or photograph, does **NOT** entitle the holder to reproduce that work. To legally reproduce a copyright work you must have the permission of the copyright owner.

Copyright only protects the form of expression, that is, the exact words or images that make up the work. Ideas or subject matter are not protected by copyright. In the case of a close match of two works the matter of *scenes à faire* often comes into play. The case Alexander vs. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978), defined *scenes à faire* as “incidents, characters or settings which are as a practical matter indispensable or at least standard in the treatment of a given topic.” An example of this might be a crime novel featuring a detective and his sidekick. Many novels of this genre feature a sidekick; the presence of the sidekick could not be used to show copyright infringement. Using *scenes à faire* to show similarities between two works will not establish copyright infringement.

Somewhat similar to *scenes à faire* is the merger doctrine. The merger doctrine is best explained by this quote from a U.S. court.

> *Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea. See CDN Inc. v. Kapes, 197 F.3d 1256, 1261 (9th Cir. 1999). In such an instance, it is said that the work's idea and expression "merge."*
>
> *ETS-HOKIN v. SKYY SPIRITS INC.,*
> *225 F.3d 1068 (9th Cir. 2000)*

Derivative works, the creation of an illustration from a photograph, a movie from a novel may violate the copyright of a work. Ottawa, Ontario based Corel became involved in a court case in 1994 when an art contest winner was found to have used a photograph, without permission, as the basis of an illustration. Designer Stephen Arscott used a photograph, "Potawatamie Indian", taken by Nick Vedros, as a basis for a drawing in his contest entry "The Real West". Tony Stone Images, a stock photo library who licensed the photograph in 1986, sued both Corel and Arscott.

A photograph based on an existing photograph is also considered a derivative work and may infringe on the copyright of the original. In Canada, the case of Ateliers Tango Argentin Inc. v. Festival d'Espagne et d'Amerique Latine Inc. defined copyright infringement in a derivative work:

> *For there to be copyright infringement, it is not necessary that the reproduction of a work be a slavish copy, as infringement is defined as including any colourable imitation. While no one can be prevented from using a photograph to reproduce the posture or traits of a person, when the original aspects of a work are reproduced there is infringement.*
>
> *Ateliers Tango Argentin Inc. et al. v.*
> *Festival d'Espagne et d'Amerique Latine Inc. et al. (1997) 84 C.P.R. (3d) p. 59*

In this case, the organizer of a Quebec dance festival Festival d'Espagne et d'Amérique Latine used as a basis for a photograph, a photograph created for a Montreal dance company (Ateliers Tango Argentin). The organizer, Antonio Grediaga Bueno, asked the photographer he hired to duplicate the principle elements of the original photograph (the location, the number of dancers, and the composition). The court found that the dance festival, Mr. Bueno, the executive assistant (Mr. Bueno's son) and the photographer were all liable for infringement of copyright. This decision was upheld on appeal.

It should be noted, according to the case transcript, that Mr. Bueno told the photographer that he owned the original photograph. The court found that the photographer had not fully investigated this claim and the photographer was thus held liable for the infringement of copyright along with the other defendants. Always practice due diligence and ask for

proof if someone claims to own the copyright or a license which specifies that the licensee may use the original work in the way requested. In Canada, a copyright licence which grants an interest in the work must be in writing.

> *. . . and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent*
>
> *Copyright Act c. C-42, Section 13.4*

Note that the provision for a written licence only applies to the granting of an interest in the copyrighted work; it does not apply to a licence which is "a mere permission to do a certain thing." (see Nicholas v. Environmental Systems (International) Limited, 2010 FC 741 (CanLII), http://canlii.ca/t/2bl2s retrieved on 2015-07-17, Paragraph 95). For more about licencing see the **Economic Aspects of Copyright** section of this document.

Fair Dealing and Fair Use

You'll often hear the phrase "fair dealing" or "fair use" applied to copyright. Fair dealing is a term found in the Canadian Copyright Act, that can be applied to the use of small portions of a copyright work for the purpose of research, private study, criticism, review or news reporting. Rather than providing permission in advance for the use of copyright material, fair dealing is used as a defense in copyright infringement cases and is dependent upon interpretation by the courts.

There are exceptions granted in the Copyright Act which allow you to make a copy of a copyright work without obtaining the permission of the copyright owner. For example, works such as statues that are permanently situated in public places may be sketched or photographed without infringing on copyright. For a complete list of all exceptions granted consult the current Canadian Copyright Act.

Fair use is a term used in the United States, similar to fair dealing in Canada, but much more broadly interpreted. In the United States a derivative work that is a parody of the work it was derived from may be protected under 1st Amendment Rights; the right of free speech. This was demonstrated in a case involving a "rap" version of Roy Orbison's "Oh Pretty Woman" by 2 Live Crew (Luther Campbell, aka Luke

Skywalker v. Acuff-Rose Music, Inc., United States Supreme Court, 114 S.Ct. 1164 (1994)). The United States Supreme Court determined that the song was a parody that made fair use of the original.

A parody, to be considered fair use, must be a parody of the work of art that it parodies; you may not make use of a copyright work to parody something else. Artist Jeff Koons, hired the Demetz Studio in Italy to create a sculpture based on the photo, "Puppies", taken by Art Rogers in 1980. Rogers sued Koons for copyright infringement in 1991 and won (Rogers v. Koons 960 F.2d 301 (2nd Cir. 1992)). Koons used the parody defense, claiming that his sculpture, "String of Puppies", was a parody of society at large. The court found that, while the sculpture may have been a parody of society at large, his sculpture did not parody the original photograph by Rogers and thus Koon's use was not fair use.

First Sale Doctrine

As previously noted one of the rights of the copyright holder is the right to distribute a work. Once a copy of the work has been sold, the copyright owner loses the right to control the distribution of that particular copy of the work. The purchaser may sell the copy, give it away, lend it out and, in some cases, rent it under the first sale doctrine. This doctrine is also called first sale rights or, in the European Union, the exhaustion of rights.

It is this doctrine that allows public libraries, video rental stores and used bookstores to operate. Some first sale rights may be limited by legislation (e.g. rental of software in the U.S. is excluded) or by a contract between the seller and buyer.

Public Domain

The term "public domain" is often misunderstood and abused. Strictly speaking, public domain refers to a work which may be freely used by anyone. A public domain work is not protected by intellectual property laws. A work may become public domain if:

- the term of copyright has expired
- the copyright holder failed to renew copyright where and when required
- the copyright holder has, in writing, placed the work in the public domain

- the work is one which is not protected by copyright law (e.g. a fact). **Caveat:** a creative work may be protected under some other type of intellectual property law such as a trade-mark or industrial design. Also note that facts may be incorporated into a work. For example, the town of Huntsville in in a particular location in the Province of Ontario. If an artist draws a map of Ontario, including Huntsville, the map is a work protected by copyright.

Works do not have to bear any copyright symbols or be otherwise identified to be protected under copyright law. Do not assume that a work is public domain because it is posted on the Internet. Remember that works are copyrighted when created and that a work does not require any identification to be protected by copyright.

Economic Aspects of Copyright

Photographers, illustrators, musicians and other artists usually license the rights in their works based on usage; the intellectual rights in the work are retained by the artist. A license is permission to use the work under specified conditions; the copyright owner retains copyright. Licensing is a type of value-based pricing; the price of the license is directly dependent on the value of the work to the company or individual using the work. Licenses may be defined by time, geographic area, media or by a mix of factors. A work may be exclusively licensed to only **one** individual or may be licensed to many, a non-exclusive license. An exclusive license is not the same thing as a sole license. A sole license gives both the licensee **and** the licensor permission to the same usage.

A license may be written, oral or implied. An implied license is one that is implied by the actions of the parties involved. The problem with an implied license is that the existence and scope of such a license must be determined in court; usually a long and costly process.

Another type of license is the bare license, often given without consideration, that confers a non-exclusive right to use a work.

An assignment is the transfer of part or all of the rights in a work to someone else. An assignment may be exclusive or non-exclusive.

There are intellectual property licenses which are mandated by law. You may have heard of compulsory licenses, statutory licenses and mechanical licenses. These types of licenses are used primarily in the

music, recording and broadcast industries. There is a provision in the Canadian Patent Act for compulsory licensing to manufacture or to import patented drugs.

Remember that simple possession of a work does NOT entitle you to reproduce that work. Protect yourself; INSIST on a written copyright license before you use the work, don't rely on an oral license or an implied license.

Moral Rights

Associated with but distinct from copyright are the moral rights of the artist. The moral rights of the artist don't have anything to do with the obscenity or morality of a work, but rather with the ongoing relationship between the creator of the artwork and the artwork itself. Moral rights include the right to:

- associate the artist's name with a work of art
- not associate the artist's name with a work of art
- use a nom de plume (pseudonym) with a work of art
- modify, distort or destroy a work of art
- not associate a work of art with a product, service or cause that may be prejudicial to the artist's image

Unlike copyright, moral rights may not be sold or assigned by the artist. However, moral rights can be waived by the artist; in other words the artist can give written permission to use a work of art in a particular way or for a particular cause. Moral rights are difficult for many people to comprehend; even people who deal with artists everyday don't always understand moral rights. In one magazine article about stock photography the author mistakenly thought that moral rights referred to the morality of use. Given some of the court cases that have appeared during the last few years, such ignorance could have dire consequences.

Moral rights are part of Canadian and U.S. Copyright law. In Canada the Copyright Act, R.S., c. C-30, s.1. Sections 14.1 and 14.2 define moral rights, Sections 28.1 and 28.2 define moral rights infringement. In the U.S. the Visual Artists Rights Act of 1990 (VARA) Title 17, Chapter 1, § 106A defines moral rights and the scope of those rights. U.S. moral rights are much more limited than those in Canada; **the following information in this section concerns Canadian law.**

Michael Snow, a famous Canadian artist, created a sculpture of Canadian geese for display in a public mall. As part of a Christmas promotion, someone had red ribbons tied around the necks of the geese. Mr. Snow took the mall management to court, contending that the ribbons made the sculpture look ridiculous and thus was prejudicial to his reputation as an artist. The court agreed with Mr. Snow and ordered the ribbons removed (Snow v. The Eaton Centre Ltd. et al. (1982), 70 C.P.R. (2d) 105 (Ont. H.C.J.)).

The band "The Parachute Club" threatened legal action after McCain Foods used the song "Rise Up" in a commercial. Although EMI Music Publishing had the right to license the copyright to the song "Rise Up", the band, had the moral right to prevent an association with a product, in this case frozen pizza. Several members of the band stated in a press release that "As a result of its use on the ad, both the song, the people who believe in it and the reputation of its creators have suffered damage within the sphere of public credibility and our personal reputations."

Associating an artist with something they may consider repugnant is a fast way to create monumental public relations problems for yourself and your business. You should get a waiver of moral rights from the artist before using artwork for anything which may be considered the least bit controversial. Never modify any artwork without the artist's written permission.

Other Intellectual Property Rights

There are other intellectual property rights, rights protecting intellectual works as opposed to rights protecting physical objects, which are sometimes confused with copyright.

International protection for intellectual property is governed through various treaties and multilateral conventions between countries. These treaties are administered by the World Intellectual Property Organization (WIPO), a United Nations agency. Presented here is a quick overview of other intellectual property rights. Protection for some of these rights varies by country, state and province.

Trade-Marks - A trade-mark (trademark in the U.S.) is used by a company or person to distinguish their goods or services from those produced by another company or person. Trade-marks may be either registered ® or unregistered ™ and may be either words, artwork, a design or a combination of these. Since trade-marks are territorial in nature, registration of the trade-mark must be done in each jurisdiction in

which protection is desired. To be protected in Canada, a trade-mark must be distinctive and it may NOT be generic or descriptive of the goods or services. The U.S. protects descriptive trade-marks but only under certain conditions. See the U.S. Patent and Trademark Office concerning trade-mark protection in the U.S.

Patents - Patents protect inventions, that is a description of an actual physical item or process. Patents DO NOT protect ideas. Drugs, electronic devices, computer algorithms are some of the things that can be patented. Patent protection varies by country. In the U.S. a patent on an actual physical item or process is called a utility patent.

Industrial Designs - Industrial designs protect the aesthetic design or ornamentation of a product as distinct from its technical or functional aspects. In the U.S., industrial designs are called design patents.

Privacy and Publicity Rights

The right of privacy and the right of publicity are **not** intellectual property rights but are often confused with those rights. The right of privacy is concerned with the public disclosure of private facts. The right of publicity is primarily concerned with the economic value of a person's persona; the name, image, style, voice and other distinctive traits associated with a model, actor, sports figure or other personality. If you're using a recognizable image of a person in a commercial context, you must be aware of privacy and publicity rights.

In the case of healthcare simulation, using an image from online sources in a scenario could be problematic. For example, associating an individual with a scenario involving an STD might be found to be false light or defamation. The person does not need to be well-known or the scenario distributed widely for serious damage to occur. Similar problems may occur if some types of medical images are distributed without being scrubbed of identifying data.

Publicity rights are protected in some jurisdictions by legislation; for example in the State of California by the Celebrities Rights Act. Privacy rights may be protected by specific legislation such as the Quebec Charter in the Province of Quebec, or may be protected by common law.

Actress Hedy Lamarr (1913-2000), famous for films in the 1930's and 40's, sued Corel Corp. of Ottawa, Canada for using her image without her consent. The lawsuit, launched in 1998, was over her image appearing on software packaging for Corel Draw. An agreement between Ms. Lamarr and Corel granted Corel a license to use her image.

A performer's signature style may also be protected. When the Ford Motor Company through their advertising agency, asked singer Bette Midler through her manager Jerry Edelstein to perform in a Ford commercial they received an unequivocal "no". Undaunted, they hired one of her former backup singers, Ula Hedwig, to record a "sound-alike" commercial. Although they had permission from the copyright holder to use the song, Bette Midler sued, won and was awarded $400,000. The court determined that since the advertising agency had gone to considerable lengths to copy Bette Midler's style, her style must have been distinctive and be of value to them.

Individual privacy rights versus journalistic freedom of expression are given different weights depending upon where you are. The Supreme Court of Canada upheld a decision that the publication of a photograph of a young woman, taken in a public place, violated her privacy (Aubry v. Éditions Vice-Versa inc., File No.: 25579. 1997: December 8; 1998: April 9, Supreme Court of Canada). In Quebec artistic expression does not include the right of the artist to infringe on a fundamental right, the right of privacy, of the subject.

A New York court determined that photographs of a 14-year-old model, used to illustrate a magazine column, did not violate her privacy under New York law even when the photographs might have "been viewed as falsifying for fictionalizing plaintiff"s relation to the article." (Messenger v. Gruner + Jahr Printing and Publishing, NY Court of Appeals, ASCOA, 2 No. 170, February 17, 2000). The article in question was a teen advice column in *Young and Modern* June/July 1995, offering advice to an unidentified teen. A bold caption appearing at the beginning of the article in which photographs of Messenger appeared stated "I got trashed and had sex with three guys."

The court interpreted the concept of newsworthiness very broadly to include any subject of public interest. New York privacy law was "strictly limited to non consensual commercial appropriations of the name, portrait or picture of a living person" and the appeals court ruled

that the privacy law did not apply in this case. In both the Quebec and New York cases, no model release had been signed by the subject of the photograph.

If an identifiable person appears in a commercial photograph, it is essential to get a model release. Model releases are required for ALL advertising uses but are usually not required for news or editorials. In the case of sensitive uses such as associations with a product or a cause that may cast an unfavorable light upon the subject, you should have a custom model release created by a lawyer.

Property Rights

Property rights are the rights associated with goods and places (real estate). There may be some elements of conversion when property rights are violated. The property may also be associated with an individual and the use of a photograph may involve privacy issues or personality rights. The Canadian copyright act does allow for photography of certain items such as building and artwork or decoration associated with them.

Some outdoor areas, such as parks, require permits for commercial photography. In Australia, the Uluru Kata Tjuta National Park has extensive rules outlining when and where photography may take place, the composition of photographs and the park must approve individual images before use.

You may also require property releases for photographs containing buildings, especially for interior views of the building or for buildings that cannot be seen from a public place. For most buildings fronting on a street or public place, property releases are not required. Aside from buildings, other identifiable personal property such as cars or pets should have property releases.

The owners of some buildings, for example the Chrysler Building, New York City, designed by William Van Alen, claim that their buildings are trade-marks and are protected intellectual property. This view has proven difficult to defend in court. The Rock and Roll Hall of Fame and Museum in Cleveland, Ohio trade-marked its unique building, designed by architect I. M. Pei. Photographer Charles Gentile took a photograph of the building and marketed the image, along with the title “Rock ‘N Roll Hall of Fame” as a poster in the spring of 1996. The museum took Gentile to court arguing infringement of their trade-mark and got an

injunction against him. On appeal, Gentile argued successfully that the title was merely descriptive and the image was just a photo of a well-known building.

My email address is below as an image to fool spambots

barry@barrymrobinson.ca

This chapter 15 pages total.

Last update: June 4, 2017