

WHO OWNS THE PLAN? By Robert J. Meisner, O.L.S.

The question of who owns the plan, the surveyor or the client, is one which has plagued the surveying profession for some time. The determination of who owns the plan will provide answers to the following often asked questions: Does the client have the right to unlimited use of the plan in subsequent dealings? Does the client have the right to reuse the plan for some other purpose than was originally intended? Does any person, other than the surveyor who prepared the plan, have the right to alter the plan? Does a third party have the right to use the plan bearing in mind that the plan was not prepared for his use?

In order to determine ownership of a plan, the survey must first be broken down into its components: the actual field survey and its accompanying field notes and the final plan and report of the survey.

The Canadian Copyright Act provides copyright protection to "Literary Works" which in section 2 of the said Act, includes among other works: maps, charts, plans and reports, tables and compilations. It is under the category of "Literary Works" that maps and plans and reports relating to surveys are protected by the Copyright Act.

The Copyright Act does not provide protection for ideas, procedures, processes, systems, methods of operation, concepts, principles or physical facts and conditions. A surveyor therefore, cannot seek protection under the Copyright Act for the assimilation of certain facts pertaining to a piece of property, even though those facts are set down in field notes. Until those facts are fixed on some tangible illustrated medium, they are not proper subjects for copyright. In other words, a surveyor cannot claim copyright protection for the field aspect of a survey since they constitute physical facts whose existence is beyond the surveyor's control. However, the expression of the interpretation of these physical facts on an illustrated medium, such as a plan, is protected by copyright.

This concept of expression can be best illustrated by the following example: while the tangible document, the survey drawing, might be a proper subject for copyright because it is an expression of surveyor oriented facts, such as the topographical features of a particular tract of land, the facts themselves — the field data — are not proper subjects of copyright.

What is Copyright?

Section 3(1) of the Copyright Act defines copyright —

"For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever and includes the sole right in the case of a Literary Work to make any contrivance by means of which the work may be mechanically delivered."

Section 5 of the said Act states —

"The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death."

Who Owns the Copyright?

Section 12 of the Copyright Act defines the Author of a work subject to copyright, as being the first owner of the copyright in such work. The only exception is as stated in Section 11 of the said Act, the plans were prepared for and under specific instructions of a Crown department. In such cases the ownership of the copyright would subsist in the Crown.

Subsection (3) of Section 12 of the Copyright Act states —

"Where the Author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his 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 issue which therefore must be addressed is the effect of the surveyor/client relationship respecting ownership of copyright in the plans of survey prepared by the surveyor at the request of the client.

A review of the facts respecting the relationship between the surveyor and his client would indicate that the agreement between the surveyor and his client may be characterized as a contract for services (independent contractor) as distinguished from a contract of service (employee/employer). The determination of this issue has been considered by the courts as being a question of fact. Elements such as the degree of control by the employer, the place where the service is to be rendered and the obligation on the part of the employee to obey orders of the employer must all be taken into consideration.

It would appear that a Land Surveyor is engaged with little or no direct control by a client in the particulars of the preparation of a plan of survey once a client has requested such a plan. It may be concluded that the relationship between the surveyor and his client is that of an independent contractor, pursuant to a contract for services. Therefore, in the absence of an agreement to the contrary, and except where the work is being prepared for and under specific instructions of the Crown, the copyright in the plan and accompanying reports would subsist in the surveyor.

However, the Copyright Act provides for agreements between employers and employees and between Author and client. A further review of the facts respecting the relationship between the surveyor and his client may lead one to conclude that the delivery by the surveyor to his client of a plan of survey pursuant to his client's instructions implies a transfer of copyright in such plan of survey. Section 12(4) the Copyright Act specifically states —

"The owner of the copyright in any work may assign the right, either wholly or partially, but no such 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 his duly authorized agent."

The foregoing analysis addresses itself to the question of who owns the plan, the surveyor or the client. Unless there has been an assignment in writing by the Author of the plan to the client, or unless the plan has been prepared under specific instructions from the Crown, the ownership and the copyright of the plan subsists in the surveyor.

It should also be noted that notwithstanding any assignment of copyright by the Author, Section 12(7) protects the Author against any distortion of his work —

"Independently of the Author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the Author has the right to claim Authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation."

Copyright protection in Canada is automatically acquired upon the creation of an original work. It is only necessary to include the Universal Copyright Symbol on works where international protection, in accordance with the provisions of the Berne Convention, is desired. Although it is not necessary to include the Universal Copyright Symbol on plans and reports that are intended for use in Canada, the use of this symbol and a cautionary statement provides indisputable notice to those unsuspecting persons who have a tendency to copy or alter someone else's work.

Infringement of Copyright

Section 17(1) of the copyright defines infringement—

"Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.

(2) The following acts do not constitute an infringement of copyright:

(a) Any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary."

Therefore, under fair use, a surveyor has the right to use the information from a plan in the preparation of another plan, a lawyer has the right to use a copy of a plan in order to do title research and to obtain the necessary consents as required in a conveyance of title, a professional association has the right to critique a surveyor's plan and a client has the right to use the plan for his own private use in accordance with the purpose of the plan, without infringing copyright.

Now that we have determined that the Author of the survey plan is the owner of the plan, the only exception being where an assignment of that right has taken place, we can answer the questions posed at the beginning of this paper.

The answer to all questions is "NO", unless permission is obtained from the surveyor who prepared the plan.