



# COPYRIGHT

## *Protection for Surveyors Against Unauthorized Use and Unauthorized Alterations to Plans*

BY ROBERT J. MEISNER, O.L.S.

**T**WO RECENT developments, one social and the other technological have occurred which threaten the professional welfare and status of Ontario Land Surveyors.

In the social field, consumer awareness brought on by intense media coverage and by necessity through recession and inflation, has caused the public to "shop around" for an inexpensive survey or a cheaper alternative.

In the technological field, photocopiers are now capable not only of producing perfect copies, but are also capable of producing top quality transparencies from paper prints. It is now a simple, inexpensive matter for unsuspecting or unscrupulous persons to make virtually undetectable deletions from or additions to plans.

Combine these two factors and we risk both unauthorized use and unauthorized alterations to surveyor's plans.

Who suffers from this unauthorized use and alterations to plans?

The public suffers since unwittingly he gets what he pays for - either an outdated plan or one misrepresenting the facts.

The individual surveyor suffers since he would appear to assume all the liabilities without remuneration.

And the Association suffers since the reputation of the profession is at stake.

A few examples of unauthorized use or unauthorized alterations to plans will serve to illustrate this point.

1) A sketch prepared by a surveyor from aerial photos for severance approval purposes illustrates scaled distances from several buildings to the proposed new limits. Without the knowledge of the surveyor, the severance sketch ends up, the title appropriately altered, in a mortgage lending office as part of a mortgage application.

2) An architect superimposes a building over a part on a print of a reference plan obtained from the Registry Office. The proposed building is irregular

and not oriented squarely on the property. The architect scales offset distances to the building indicating compliance with municipal setbacks etc. The problem occurs when a surveyor, in attempting to lay out the building, discovers that the original reference plan is not strictly to scale, photocopying has further distorted the scale and the proposed building does not now comply with municipal by-laws.

3) A sketch is prepared for a client who intends to make an application to the municipality for a zoning change in order to develop the property. The municipality, without the consent of either the surveyor or the client, alters the sketch and uses it in a notice in the newspaper for intended heritage designation of the property.

4) A plan is prepared for a client for mortgage purposes and is subsequently used by a third party, several years later, appropriately altered to reflect additions to buildings, for the purpose of refinancing.

In all of the above noted cases the surveyor, who originally signed the plan or sketch would appear to be liable in the eyes of the unsuspecting public and may very well end up in court defending his professional image against unwarranted charges.

The question of who owns a survey plan, the surveyor or the client, is one which has plagued the surveying profession for quite some time. Does the client have the right to use this plan in subsequent dealings? Does the client have the right to use this plan for some other purpose than was originally intended? Does any one other than the surveyor who signed 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 may very well be outdated?

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

The Canadian Copyright Act provides copyright protection to literary works which includes amongst other

works; maps, charts, plans, tables, reports and compilations. It is under the category of "Literary Work" that maps, 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 a field book. 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, 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?**

For the purpose of the Canadian Copyright 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.

Subject to the Copyright Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary work, if the author was at the date of making the work, a citizen or subject of a foreign country that has adhered to the revised Berne Convention.

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.



In the case of a work of Joint Authorship, copyright shall subsist during the life of the author who dies last and for a term of fifty years after his death.

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the control of Her Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in such case shall continue for a period of fifty years from the date of the first publication of the work.

### **Ownership of 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.

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; and Subsection (4) states:

The owner of the copyright in any work may assign the right, either wholly or partially, but no such 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 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 degree of independence on the part of the employee, 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 the client in the particulars of

the preparation of a plan of survey once the 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 absence of an agreement to the contrary, and except where the work is being prepared for the Crown, the copyright in the plan of survey would subsist in the surveyor.

However, the Copyright Act provides for agreements between employers and employees despite the fact of the relationship of independent contractor. A further review of the facts respecting the relationship between surveyor and client may lead a court 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. However, such an implication must arise from a construction of facts and the intention of the parties at the time the relationship between the parties was entered into. For this reason, it is arguable that copyright continues to subsist in the surveyor.

However, in order to ensure that such controversies do not create problems respecting the tracing of the chain of title to the surveyor, a contract should be for-

warded from the surveyor to the client, at the time of engagement, setting out clearly the fact that copyright in such survey would continue to subsist in the surveyor. This contract would also give license to the client to use the plan of survey for the purpose for which such plan was requested by the client.

The above analysis therefore addresses itself to the issue of ownership of copyright in the surveyor versus the client. An assignment from a client to the surveyor in instances of infringement by third parties would ensure the surveyor sufficient evidence of ownership of copyright to enforce rights of copyrights in the plan of survey.

Additionally subsection (7) of section 12 of the Copyright Act states: 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.

### **Infringement of Copyright**

Section 17 (1) of the Copyright Act states:

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 purposes of private study, research, criticism, review, or newspaper summary.

Copyright in Canada is automatically acquired upon the creation of an original work. If copyright protection under the provisions of the Universal Copyright Convention is to be retained in other countries it is necessary that all copies of the work be identified in a conspicuous manner with the Universal Copyright Symbol together with the name of the copyright owner and the first year of publication. e.g.

© John Smith O.L.S. 1982.

Although it is not necessary to include the Universal Copyright Symbol on plans that are intended for use in Canada, the use of this symbol provides indisputable notice to those unsuspecting or unscrupulous persons who have a tendency to copy or alter plans.

As a further safeguard the following statement should be included on the plan beneath the Universal Copyright Symbol;

“No one may copy, reproduce, distribute or alter this plan without the written permission of John Smith, Ontario Land Surveyor.”

Although copyright in Canada is automatically acquired upon creation of an original work, the copyright is not automatically registered. There are certain advantages to registering the works in the copyright office.

If the copyright to an unregistered work is being infringed upon, and a request to cease the infringement is ignored, action must be taken through the courts. If it can be proven in court that the infringed work is owned by the person bringing the action, the Court is limited to issuing an injunction to stop the infringement. However, if the copyright is registered, as evidenced by the issuance of a certificate by the Copyright Office, the Court, in addition to issuing an injunction, may award costs and damages.

### **Registering of a Copyright**

It is not economically reasonable or



practical to register the copyright on each plan separately. The registration of copyright may be accomplished by simply binding many plans into one or more volumes and each volume may be registered as one work at a nominal fee. It is not necessary to send the bound volume or volumes to the copyright office when application is filed, since an owner is protected as soon as he creates his work. An application merely adds to his protection by providing him with a certificate that can be used as proof of ownership of the rights that are protected in a court of law.

The application for the registration of a copyright may be made in the name of the author or his legal representatives, by any person purporting to be an agent of such author or legal representatives.

Application for registration of a copyright shall be made in accordance with the prescribed form, and shall be deposited at the Copyright Office together with the prescribed fee. (See Addenda A & B.)

Once registration has been completed no further fees are required to keep the copyright in force and in Canada, copyright continues for fifty years from the death of the owner.

### **Fair Use and Dealings**

If copyright exists in any surveyor's plan, the question is bound to be asked; can I use another surveyor's plan or information from that plan in preparing a plan and survey for my client? As previously stated any fair dealing with any work for the purpose of private study, research, criticism, review etc. does not constitute an infringement of copyright. Therefore, under fair use; a surveyor has the right to use information from a plan in the preparation of another survey and plan, an examiner of surveys has the right to review or criticise that plan and a surveyor has the right to disagree with the plan, without compensating the author of the original plan.

There may not be any advantage to registering a copyright for certain types of plans such as registered plans of subdivision, registered expropriation plans and registered Boundary Act plans, since these plans are controlled both in format and content by many government agencies. It is the writer's opinion that the aforementioned plan types should not contain a copyright statement since use of these plan types is controlled at the Registry Office

and in any event reproducible duplicates are required to be forwarded to various government agencies for their internal use. While this internal use by government agencies might be termed "fair use", it is virtually impossible to control the destination of all copies reproduced in the government offices.

In the case of a draft plan of subdivision or similar plans prepared for study purposes, and if the surveyor is the author of the plan, he should include a copyright statement on the plan. However, if he did not design the subdivision, and is acting only in his capacity as a surveyor in certifying the boundaries, he cannot claim authorship of the plan and should not include the copyright statement thereon.

In respect to plans deposited in Registry Offices such as reference plans, the plan becomes a public document upon deposit. Their use in subsequent legal descriptions and the distribution of prints as required under the Land Titles and Registry Acts is considered to be "fair use". The unauthorized use of copies obtained from the Registry Office for purposes other than originally intended is considered "unfair use" and subject to court action. It is recommended that a copyright statement appear on all plans for registration or deposit, other than those previously excluded, permitting duplication and fair use in the Registry Office and prohibiting duplication and unauthorized use once the plan is out of control of the Registry Office. A suggested statement is:

"Except as provided for under section 164 of the Land Titles Act and/or sections 16 and 17 of the Registry Act, no one may copy, reproduce, alter, or distribute this plan without the written permission of John Smith, Ontario Land Surveyor."

All other plans, such as building location surveys, severance sketches, topographical plans, accident surveys, study plans etc. should contain the international copyright symbol and restricting statement.

### **Conclusions and Recommendations**

The actual observations taken by a surveyor and the field notes depicting these observations in the course of a survey are not subject to copyright, since these observations constitute physical facts, procedures, conditions and methods

of operation. The expression of physical facts, procedures, conditions and methods of operation observed in the field and illustrated on a plan are proper subjects of copyright.

It is therefore recommended that all plans, with the exception of those prepared under instructions from a government agency and those plans such as registered plans of subdivision, expropriation plans and Boundary Act plans, contain the Universal Copyright Symbol and a suitable statement as previously noted restricting the reproduction, alteration or use of the plan.

As previously discussed, the ownership of plans is questionable at law and in order to assert ownership it is recommended that all surveyors adopt a "telephone contract" whereby the particulars pertaining to the required survey are noted on a preprinted contract form and forwarded to the client prior to commencing the work.

It is mandatory that ownership of plans be negotiated prior to completion of the plan in order to protect the surveyor's right to copyright.

Approval by the Ministry of Consumer and Commercial Relations is required before including copyright statements on plans for deposit in the Registry Offices.

When this approval has been received appropriate sample contract forms will be circulated to the membership together with recommendations for inclusion with the OLS Standards.

### **COMMENTS ON THE FOREGOING**

**By Brian M. Campbell  
AOLS Legal Counsel**

The report is a thorough summary and analysis of the Copyright Act as it applies to plans of survey and it is our opinion that the Copyright Act does apply to plans of survey and the conclusions reached in the report are correct.

Section 12(3), however, may affect a surveyor's right to the ownership of the copyright. This section provides that where an author prepared the copyrighted work while in the employ of some other person under a contract of service, the employer shall be the owner of the copyright in the absence of any agreement to the contrary.

As the report correctly points out, where a surveyor/client relationship can be characterized as a contract FOR services as opposed to a contract OF service, then ownership will remain with the surveyor.



SCHEDULE

The determination of this issue is a question of fact depending on the nature of the relationship between the parties. The usual surveyor/client relationship would in most cases be one of a CONTRACT FOR SERVICES; the initial contract between the surveyor and client should clearly set out that the copyright in the survey will belong to the surveyor. Such a statement would likely constitute an "agreement to the contrary" as set out in section 12(3) and would give the surveyor copyright ownership even if his relationship with the client was characterized as a CONTRACT OF SERVICE.

The report also correctly notes that vis-a-vis a third party, if there is any doubt about ownership of the copyright, the surveyor may obtain an assignment of the ownership from the client pursuant to section 12(4).

Although it is not necessary to register a copyright, if it is registered, a defendant cannot raise the defence that he was not aware of and had no reasonable grounds for suspecting that the copyright existed. If the copyright is not registered the applicant is limited to obtaining an injunction to stop the infringement; if it is registered, the applicant may also claim damages and costs for such infringement.

Lastly, we submit that the report is a thorough summary and analysis of the Copyright Act as it affects plans of survey. ●

Column I

Column II

Service

Fees

1. Examining an application to register a copyright, including, without further fee, registering the copyright and issuing a certificate of registration of copyright .....	\$ 25.00
2. Examining an application to register an assignment, a licence, or other document affecting a copyright, including, without further fee, registering the assignment, licence or other document and issuing a certificate of registration thereof.	
(a) for the first work referred to in the assignment, licence or other document .....	25.00
(b) for each additional work referred to in the assignment, licence or other document .....	10.00
3. Providing copies of or extracts from the Register, or copies of certificates, licences or other documents	
(a) for each sheet, when a photocopy .....	0.50
(b) for each sheet, when typed .....	4.00
4. Certification of copies of documents .....	10.00

Form 9

(s.27)

APPLICATION FOR REGISTRATION OF COPYRIGHT IN A PUBLISHED WORK

I, ..... of the ..... of ..... hereby  
(city, town, etc.) (province, state, country)

declare that I am the owner of the Copyright in the original (*here insert: literary, dramatic, musical or artistic as the case may be*) work entitled "....." by..... of .....

(author's name and address)

and that the said work was first published by the issue copies thereof to the public on the ..... day of ....., 19....., in the ..... of .....

(province, state, country)

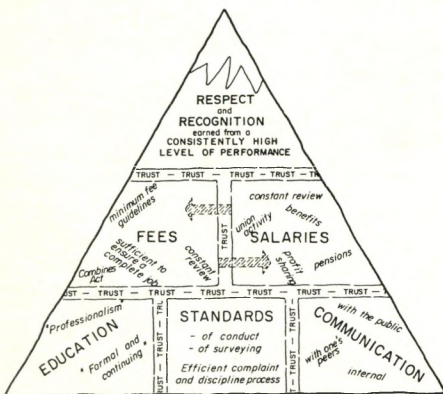
and I hereby request you to register the Copyright of the said work in my name in accordance with the provisions of the *Copyright Act*.

I forward herewith the fee of \$2 for the registration of the said Copyright and the further fee of \$1 for a certificate of such registration.

Dated at.....the ..... day of....., 19 .....

Signature  
(See rule 33)

The Commissioner of Patents,  
The Copyright Office  
Ottawa, Canada



“OLYMPUS”  
The legendary home of the Gods.  
Unattainable to mortals  
but worth striving  
towards