IS THERE AN ENFORCEABLE COPYRIGHT IN A PLAN OF SURVEY?

By Will O'Hara and Anna Husa

You are retained to prepare a plan of survey. When the survey is completed you submit it to the local municipality. A few days later you happen to see a poor quality copy of the same survey spread out on the hood of a pickup truck. It is being examined by adjacent landowners and their contractor. They received their copy from a friendly and helpful civil servant at the local municipality for the cost of the photocopying.

You may have a negative reaction to this. You may feel that something of yours has been taken without your permission. Are these reactions justified - or are you being unrealistic? Some surveyors may be sympathetic to your complaints. Others may tell you that this type of thing happens all the time. Get used to it!

Before you decide whether to get used to municipal employees copying your surveys without your permission, it may be useful to see what rights you have to prevent others from copying your surveys without your permission.

Copyright

The first step is to look at the *Copyright Act.*[1] Copyright law exists to prevent one person from copying the works of another without permission. It is entirely a creature of statute. The Act sets out all of the rights and obligations associated with copyright. All remedies available to protect against copyright infringement are also set out in the *Act.* A person who owns a copyright has the exclusive right to copy, directly or indirectly, all or substantially all or any part of an original work.[2]

Original work

Copyright law in Canada protects a wide range of "works," including every original literary, dramatic, musical and artistic work and computer program.[3] To be classed as an "original" work, the work must be more than a mere copy of an existing work, provided the author uses skill and judgment in the process.[4] This is not a demanding standard. Virtually all surveys will be classed as original works. The work must originate from the author.

The *Act* includes *"drawings, maps, charts, plans"* in the definition of "artistic works."[5] According to s. 5 of the *Act,* copyright subsists in "artistic works," subject to certain conditions. There is no doubt that a plan of survey would be regarded by the courts as an original work giving rise to a copyright. Although a work, including a plan of survey, can be registered under the *Act* as evidence of first ownership of the copyright, it is not necessary to register a work to obtain rights under the Act. Copyright is automatic.

Ownership of copyright

The *Act* provides that the author of the work shall be the first owner of the copyright. Where the author of the work was employed by some other person or company, the first owner of the copyright will be the employer.[6] In the case of a plan of survey prepared by an employee of a surveying firm, the firm will be the first owner of the copyright.

After you have scanned the *Act* you conclude that your firm owns the copyright in the plan of survey you saw spread out on the hood of the pickup truck. You know that your firm has the exclusive right to make copies of the plan, but that doesn't ease your mind. You still wonder how the municipality can make copies of your plan without getting your firm's permission.

There are two possible answers and they are mutually exclusive. The first possibility is the most attractive to you, as you recall the inferior copy of your plan.

Infringement

Section 27(1) of the *Act* states that "it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this *Act* only the owner of the *Copyright Act* has the right to do." The first possible answer is that the municipality cannot make copies of your plan without infringing your firm's copyright. It is wrong to make the copies and you can stop the municipality from doing that in the future. That is the clear-cut answer. It may offer some you some comfort, but the law is rarely clear-cut. If you try to stop the municipality from making copies of your plans you will likely be met with resistance. This leads to the other possible answer.

Fair dealing

The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in sections 29 and 30 of the *Act.* The "fair dealing" exceptions to copyright are set out in sections 29 to 29.2. Section 29 states that fair dealing for the purpose of research or private study does not infringe copyright. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright.

The Act does not define "fair" because it is impossible to define. As one eminent judge observed:

> It is impossible to define what is 'fair dealing.' It must be a question

of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.[7]

In *CCH Canadian Ltd. v. Law Society of Upper Canada*[8] the Supreme Court of Canada determined that research can include research in the commercial context, such as lawyers researching case law to advise clients or give opinions.[9] This opens the door for municipalities to argue that they too can provide research to developers or ratepayers in a commercial setting – as long as they deal fairly.

The courts will look at a number of factors when determining whether an act of copying without authorization amounts to fair dealing. These factors include the purpose of the dealing; character of the dealing; amount of the dealing; alternatives to the dealing; nature of the work; and effect of the dealing on the work.[10]

In the *CCH* decision the court observed that if a reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. If the copying amounts to fair dealing, the author of the work has no remedy against the person making the copy.

Is it a breach of copyright when a municipality copies a plan of survey and gives it away for the cost of photocopying? Assuming that the municipality has no legislative authority to copy and distribute a plan of survey (see below) then it is a clear infringement, unless the fair dealing exception applies, or the copying has been authorized by the holder of the copyright.

Considering the factors set out in the *CCH* case, the courts will first make an objective assessment of the municipality's real purpose in using the surveyor's work. The apparent purpose of distributing the copies is to assist the developer, who can obtain a virtually free copy of your plan from the municipality instead of purchasing your services directly or indirectly. At the same time, the copying may advance the interests of the municipality in seeing its tax base expand through development.

When examining the character of the dealing the court must examine how the work was dealt with. If multiple copies are made that would suggest an unfair dealing. However, if a single copy is made for a specific legitimate purpose that would suggest the dealing was fair – or less unfair. It may be relevant to consider the custom or practice in a trade or industry to determine whether or not the character of the dealing is fair.

The nature of the work is obvious. A plan of survey is a commercially produced work that is the main product of a land surveying firm. However, it has never been published like a novel, or a book of street maps. Nor is it a confidential document that has been leaked and copied in breach of the confidence. It is a document prepared with the intention of depositing it with the municipality for anyone to see.

The amount of the dealing is also important. In this case – and in most other cases where the municipality copies a plan - the entire work was copied. That suggests that the dealing is not entirely fair, although "it may be possible to deal fairly with a whole work…The amount taken may also be more or less fair depending on the purpose."[11] The other consideration is the amount of copying done by the municipalities. Frequent copying of plans by municipalities may suggest greater unfairness, but at the same time it may reflect an accepted custom in the industry.

When examining the effect of the dealing the courts will consider whether the copy of the work competes with the original work. In this case, the effect of the dealing on the work is to reduce its value to the meager cost of the photocopying. That deprives you of your ability to sell the plan at a fair value, either directly or through an intermediary who collects surveys from surveying firms and distributes them for a fair price, with compensation flowing back to the surveyor who produced the survey.

No doubt there would be other arguments for and against fair dealing and the right of the municipality to advance the needs of society by making copies of your plan available to the developer at essentially no cost.

As an aside, the same uncertainty exists in respect of plans deposited in the provincial registry offices in accordance with the *Land Registration Reform Act, Registry Act* and *Land Titles Act.* Under those statutes the deposited plans become the property of the provincial Crown. There is some debate about whether the copyright to the plans also passes to the Crown by statute. Some argue that that would amount to confiscation without compensation, which is contrary to our principles of justice. Others argue that the provinces do not have the right to interfere with copyright, which falls under federal jurisdiction. Even if copyright does not pass to the Crown there would still be questions about fair dealing in respect of copies made from plans deposited in a registry office.

An additional question is whether a land surveyor who deposits a plan with a municipality as part of a planning process implicitly grants the right to reproduce the plan. This theory is consistent with the limited case law on point. In *Robert D. Sutherland Architects Ltd. v. Montykola Investments Inc.*[12] the court held that an architect who submits a plan as part of the planning process implicitly grants the right to

reproduce the plan notwithstanding the apparently valid copyright.

Municipal Freedom of Information and Protection of Privacy Act

When faced with protests about having freely released copies of surveys from their files, many municipalities cite the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) in their defence. Section 4(1) of the MFIPPA provides that "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution" unless the exemptions in sections 6 to 15 apply. None of the exemptions addresses the release of surveys. Section 32.1(a) of the *Copyright Act* states that it is not an infringement of copyright for any person "to disclose, pursuant to the *Access to Information Act,* a record within the meaning of that Act, or to disclose, pursuant to *any like Act of the legislature of a province,* like material."

In the opinion of the authors, the MFIPPA is inapplicable. This can best be illustrated by reference to the *Access to Information Act* – MFIPPA's federal counterpart.

Section 68 of the *Access to Information Act* states that it does not apply to "material available for purchase by the public." The exemption makes sense. The *Access to Information Act* is about *confidential* information under federal government control. Documents that are available for purchase are not confidential or secret; they merely require that a fair price be paid for them as a pre-condition to their release.

So it is with surveys. There is nothing secretive about surveys. They are readily available - upon the payment of a fair price. When municipalities release photocopies of surveys to third parties, the issue is not about the disclosure of *information* held in confidence by the municipality. Rather, it is about the impropriety of making a picture of a copy-righted work for virtually nothing (other than the cost of the photocopy) when it is readily available by paying a fair price to the surveyor. In our view, reliance on the MFIPPA to by-pass the fair price requirement is a misapplication of that Act. Since the MFIPPA does not appear to apply, the exception to the *Copyright Act* is also inapplicable.

Options

What can you do if you see that someone has copied your survey without your authority, or without some other legal right? The *Act* lists a number of remedies available to any author of an original work whose copyrights have been infringed. They include an injunction to prevent future copying, damages for unauthorized copying, an accounting for income from the unauthorized copying and other remedies.[13]

An aggrieved land surveyor can start a law suit against a municipality – or any other party - to prevent the unauthorized copying and to recover any damages suffered as a result of the unauthorized copying. In the end a court would have to decide whether the actions of the party were permitted by law or whether they amount to fair dealing. If they are simply an infringement of copyright the court will make an order to prevent future infringement.

If the *CCH* decision from the highest court in the land is any guide – it is binding on trial judges – a trial judge will consider the policy implications carefully. The courts strive to maintain a balance between promoting the public interest in the encouragement and dissemination of works of art and intellect, on one hand, and obtaining a just reward for the creator on the other. It remains to be seen how a balance will be reached and what "just rewards" will be available to land surveyors in these circumstances.

[1] *Copyright Act,* R.S.C. 1985, c. C-42; http://laws.justice.gc.ca/en/index.html
[2] Section 3(1) of the *Act*
[3] Section 5 and ss. 2 and 2.1 of the *Act*
[4] *CCH Canadian Ltd. v. Law Society of Upper Canada,* [2004] 1 S.C.R. 339, paragraphs 24 and 25
[5] Section 2 of the *Act*
[6] Section 13(3) of the *Act*
[7] Lord Denning in *Hubbard v. Vosper* [1972] 1 All E.R. 1023 (C.A.), at p. 1027
[8] [2004] 1 S.C.R. 339
[9] *CCH,* at paragraph 51
[10] *CCH,* at paragraph 53
[11] *CCH,* at paragraph 56
[12] [1996] N.S.J. No. 169 (N.S.C.A.)
[13] Section 34 (1) of the *Act*

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Sites to See

http://www.canoe-odyssey.com/

This web site is devoted to retracing the Cross-Canada canoe odyssey of Sir Alexander Mackenzie, the great Scottish-Canadian explorer and fur trader (1764-1820). Between 1789 and 1793, Mackenzie became the first European to cross the North American continent, twelve years before the American explorers, Lewis and Clark.

At age 60, armed with a little recreational canoeing experience but with a grand sense of adventure, John Donaldson retraced the voyages of the great Scottish-Canadian explorer, Sir Alexander Mackenzie, his boyhood hero. John's travels spanned five years and took him more than 12,000 kilometres from Montreal, Quebec, (Mackenzie's starting point), to the Pacific and Arctic Oceans.