What happens to the copyright in a registered plan of survey?

By Will O'Hara and Anna Husa

A land surveyor who prepares a plan of survey or a reference plan that is an original work, requiring skill and judgment to create, is entitled to a copyright in his or her work product. That right is set out in the *Copyright Act* which includes "drawings, maps, charts and plans" within the definition of "artistic works".[1] The owner of the copyright is the creator of the work (or that person's employer) and is entitled to prevent others from making unauthorized copies of the work. As an alternative, the owner of the copyright is entitled to be compensated by anyone who makes copies of the work.

A plan of survey as a physical object is quite different from the copyright to the plan and the two should not be confused. According to the Supreme Court of Canada, transferring the ownership of a document does not affect the ownership of the copyright in the document.[2] A purchaser of a painting, for example does not automatically obtain the right to reproduce the work in the absence of an agreement with the copyright owner.[3] On this theory, depositing a plan of survey in a registry office does not alter the copyright to the plan.

So what happens to the copyright in a plan of survey when it is deposited in the Land Registry Office? It seems clear that the provincial registry offices make copies of the plans deposited by the land surveyors without regard to the copyright, assuming there is one, and without making any payment to the creator of the original work. Land surveyors in other jurisdictions have objected to the fact that the state (or province) was using their works for commercial purposes and have taken steps to assert their rights. Their actions have raised a number of questions which come down to the effect of registering a plan of survey on the copyright to the plan of survey. Is the copyright lost somehow when the plan is registered? Is it waived by the land surveyor by the act of depositing the plan? Is the copyright impliedly assigned to the province?

These questions have not been dealt with in Canada yet but the High Court of Australia has examined the issues in detail in a recently released decision that land surveyors in Canada should be aware of. *Copyright Agency Limited v. State of New South Wales*[4] involved a thorough examination of the effect of registration on the copyright of a plan of survey and came to some remarkable conclusions.

The basic principles of law in New South Wales are similar to those in Canada. Both are governed by a Copyright Act which establishes the rights of the land surveyors to copyrights in plans of surveys. One practical difference between the two jurisdictions is that in Australia a copyright agency acts to collect and distribute royalties on behalf of the numerous owners of the copyrights. This alleviates the need for individual claims for relatively small amounts of money. The Australian copyright agency is aptly called Copyright Agency Limited and is generally known as CAL.[5] This agency was the plaintiff in the action against the government of New South Wales on behalf of the land surveyors who objected to the state's use of their copyrighted works without compensation.

The claim was heard first by the Full Court of the Federal Court of Australia. CAL asked the court to find that the land surveyors, as owners of the copyrights in their plans of survey, were entitled to be compensated by the government of New South Wales for the unauthorized copying of their works. New South Wales argued that the land surveyors had impliedly licensed the use and reproduction of their works by submitting them for registration, knowing that the state was obligated to make copies available to the public. The Full Court agreed with New South Wales and found that there was no infringement of copyright to the plans because "the surveyor must be taken to have licensed and authorized the doing of the very acts that the surveyor was intending should be done as a consequence of the lodgment [registration] of the Relevant Plan for registration." In other words, the land surveyors had impliedly licensed the state to make copies of its works without regard for any copyright, simply because they had consented to the registration of the plans. This was not the result CAL had wished for.

CAL bravely decided to appeal the decision to the High Court of Australia, the highest court in the Australian judicial system; the down under equivalent to the Supreme Court of Canada. The narrow question was whether the Full Court had been correct in finding an implied license by New South Wales to use the land surveyors' registered plans and communicating them to the public.

The High Court examined the question in light of the statutory provisions in the Copyright Act that expressly permitted the state to make use of copyrighted works "for the services of the Crown" without infringement. It then considered whether the state was nonetheless obligated to remunerate the land surveyors or whether the "implied license" gave the state *carte blanche* to do whatever it wanted to do with the plans, without having to remunerate the creators of the works.

After examining the law in other jurisdictions, including Canada, the court concluded that New South Wales did not have an implied license to use the land surveyors' works without remuneration. The court noted that there was "nothing in the conduct of a surveyor in preparing plans for registration

which involves abandoning exclusive rights bestowed by the Act…" It also observed that "a surveyor cannot practice his or her profession insofar as it touches land boundaries, without consenting to the provision of survey plans for registration knowing the uses, subsequent to registration, to which the plans will be put." This statement is an expression of the old principle that you can't be said to consent to something you are forced to do.

The court listed other reasons why there was there could not be an implied license:

> An application on behalf of a surveyor for equitable remuneration in relation to government uses of survey plans which involve copying and communication of the plans for, and to, the public, subsequent to registration, does not undermine or impede the use by the surveyor's client of the survey plans for the purposes for which they were prepared, namely lodgement for registration and issue of title.
>
> Neither a surveyor nor a surveyor's client could be expected to factor into remuneration under any contract of engagement between them, such copying for public uses as may be engaged in by the State.
>
> The State imposes charges for copies issued to the public.

As the court pointed out, "these considerations all militate against implying a license, as a matter of law, into all contracts between surveyors and their clients, in favour of the State, which is a stranger to such contracts. They also militate against the founding of any licence in an authority or consent given by the surveyors to the State, independently of the contracts between the surveyors and their clients."

The effect of the decision of the High Court of Australia is to recognize that land surveyors have a copyright in their works and the act of registering a plan of survey does not extinguish the copyright. Land surveyors in Australia are entitled to be remunerated by the state if the state makes copies of their works and sells the copies to the public. As the Chief Executive of CAL noted in a recent press release, the decision is a significant step for all copyright owners – not just land surveyors. It acknowledges the importance of individual skill and input into survey maps and plans and puts an end to the concept of an implied license giving away the right to use works without remunerating the creator of the work.[6]

What does this decision mean for Canadian land surveyors? Clearly the decision of a court in another country – even a High Court – is not binding on Canadian courts or governments. However, the Australian legal system and the Canadian legal system flow from the same source and the underlying principles are the same. The decision of the Australian High Court will likely be very influential in any debate about these issues in Canada. The logic is attractive and the result makes sense.

[1] See our article "IS THERE AN ENFORCEABLE COPYRIGHT IN A PLAN OF SURVEY" in the Ontario Professional Surveyor, Volume 49, No. 4, Fall 2006
[2] Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd., [1940] S.C.R. 218, at 229
[3] Dynabec Ltée c. Société d'informatique R.D.G. Inc. (1985), C.P. R. (3d) 322 (C.A. Qué.)
[4] [2008] HCA 35 (6 August 2008)
[5] www.copyright.com.au
[6] See CAL's website for news releases

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Calendar of Events

October 7 to 10, 2008

URISA Annual Conference
Spatially Enabling the Enterprise
New Orleans, Louisiana
www.urisa.org

November 12 to 14, 2008

Digital Earth Summit on Geoinformatics 2008:
Tools for Global Change Research
Potsdam, Germany
www.isde-summit-2008.org

November 19, 2008

GIS Day 2008
Discovering the World through GIS
www.gisday.com

November 19 to 20, 2008

Geomatics Atlantic 2008:
Discovering the Way to a Sustainable Future
Saint John, New Brunswick
www.geomaticsatlantic.com

February 18 to 20, 2009

117th AOLS Annual Meeting
Mapping New Pathways
Toronto, Ontario
www.aols.org

March 9 to 13, 2008

ASPRS 2009 Annual Conference
Celebrating 75 Years
Baltimore, Maryland
www.asprs.org/baltimore09