NOW WE KNOW WHO OWNS THE COPYRIGHT IN A REGISTERED PLAN OF SURVEY

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Categories: Insights, Publications

In 2018 [1][2] we reported on the Ontario Court of Appeal decision in Keatley Surveying. That decision dealt with the ownership of the copyright for plans of survey submitted for registration in Ontario.[3] In that decision, the Court of Appeal upheld a decision dismissing a class action brought on behalf of land surveyors in private practice in Ontario against Teranet, the operator of Ontario's electronic land registry system. The Court of Appeal had decided that the copyright in any such plan of survey was owned by the Province of Ontario by reason of s.12 of the *Copyright Act*. This section provides in part that "where any work is, or has been, prepared or published by or under the direction or control of Her Majesty [the government] or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty".

On September 26, 2019, the Supreme Court of Canada released its decision[4] in the appeal from the Ontario Court of Appeal decision. While all seven of the judges who participated in the appeal agreed in the result – that the Province owns copyright in plans of survey submitted for registration in Ontario – four took one path to that result, and the remaining three took another.

Before examining the two paths taken to the conclusion that the Province of Ontario is the owner of the copyright in a registered plan of survey, it is worth reviewing some of the provisions of the Ontario registration system:

- When a land surveyor creates a plan of survey, the applicable legislation requires them to research all evidence related to the parcel of land being surveyed, including previously registered plans of survey for the parcel of land being surveyed and any abutting lands. The land surveyor needs to access these plans through the official government system run by Teranet;
- The applicable legislation explicitly provides that every registered instrument is the property of the Crown (government);
- The regulations governing the registration process provide that no document that contains any copyright mark by words of symbols will be accepted for registration or deposit; and
- Once a plan of survey is registered, only the Examiner of Surveys appointed by the government has the authority to amend the content of such a plan.

The purpose of the old paper-based registration system and the current electronic Teranet system that replaced it is to provide an accessible public record describing every parcel of land in the Province and the rights (ownership, mortgages, easements and the like) that affect each parcel. A registered plan of survey is an essential component of the description of each parcel of land.

The first path to the conclusion that the Province owns the copyright in a registered plan of survey begins with a review of the jurisprudence that under the *Copyright Act*, creators have rights; but so do users, and the need to properly balance these rights. This balance must necessarily guide the proper interpretation of s.12 of the *Copyright Act*. The four Justices then considered the first "prong" of s. 12, "prepared by or under the direction or control" of the government. They interpreted "direction or control' to require the Crown to do more than set formal requirements or guidelines over how a work was to be made, but the "direction or control" had to be such that the production of the work is the principal object and not a peripheral consequence of the government's direction or control. This led to the conclusion that the government had to exercise direction or control over both the person preparing the work and the work itself for s. 12 to apply.

From this stage, the four Justices considered the second "prong" of section 12 "published by or under the direction or control" of the government. The four Justices noted that an expansive reading of this part of s.12 would profoundly interfere with the general scheme of the *Copyright Act*, which generally presumes, subject to some exceptions, that authors are the owners of the copyright in the works that they create. Consequently, for a work to be "published by or under the direction or control" of the government, the government must exercise control over the publication process including both the person publishing the work and the nature, form and content of the final published version of the work.

Determining whether the government exercises sufficient direction or control of the publication of a work sufficient to transfer copyright to the government under s.12 requires an examination of the government's interest in the work at the time of publication. The following factors all point to a sufficient degree of "direction or control":

- a statutory scheme expressly transferring property rights in the work to the government;
- strict controls over the form or content of the work;
- whether the government obtains physical possession of the work;
- whether the government body has the sole right to modify the work;
- an opt-in process; and
- the necessity of the government making the work available to the public to carry out the statutory scheme.

The second path to the conclusion that the Province owns the copyright in a registered plan of survey is a little

more direct. It starts with a consideration of the principles of statutory construction; and particularly the principle that "the legislature does not intend to produce absurd consequences". The three Justices who took this path noted that a literal reading of s.12 would empower the government to expropriate the copyright in any work "*merely by publishing the work itself or causing a third party to publish the work*". Instead of relying on the "direction or control" wording to avoid such an absurd result, the three Justices instead chose to interpret s.12 as if it applied only to a "government work". They defined this as "a work that serves a public purpose and in which vesting the copyright in the Crown furthers that purpose."

The balance of the reasoning of the three Justices considers difficulties with the approach taken by their four colleagues, and in particular the failure of that approach to provide "future guidance on how to determine where copyright vests in the Crown under s.12." There is discussion of academic writing, the French version of s.12, other Commonwealth decisions interpreting similar provisions and the legislative history of the section, including the U.K. provision that was the basis for s. 12, all of which were said to support the restriction of s. 12 to applying to a "government work".

While all the Justices were able to agree on the outcome in this particular case, the inherent difficulties with the current wording of s.12 suggest that it might be prudent for the government to consider amending it to more clearly define when copyright in a work is transferred to the government.

by Peter Wells

[1] "Who Owns the Copyright in a Registered Plan of Survey?"; McMillan LLP Intellectual Property Bulletin May, 2018[ps2id id='1' target='/]
[2] "Who Owns Copyright in a Registered Plan of Survey – A Brief Update", McMillan LLP Intellectual Property Bulletin June, 2018[ps2id id='2' target='/]
[3] *Keatley Surveying Ltd. v. Teranet Inc.* 2017 ONCA 748; 139 OR (3d) 340[ps2id id='3' target='/]
[4] *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43[ps2id id='4' target='/]

A Cautionary Note