WHO OWNS THE COPYRIGHT IN A REGISTERED PLAN OF SURVEY?

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Categories: Insights, Publications

The Ontario Court of Appeal recently[1] 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 representative plaintiff alleged that Teranet, by digitizing, storing and copying plans of survey that had been registered or deposited on title in the system, was infringing the copyright owned by the land surveyor in the plan of survey.

The Court of Appeal concluded that the land surveyor did not own the copyright in a plan of survey presented for registration or deposit in the system. Instead, it held that the copyright in any such plan of survey was owned by the Province of Ontario as a result 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".

The Court of Appeal carefully considered the circumstances, including the provincial legislation regarding surveys and title to land, and concluded that the Province exercised sufficient control over the process by which plans of survey may be registered or deposited for the Province to be the owner of the copyright in any plan of survey registered or deposited in the electronic system. It found that the contract between Teranet and the Province made it clear that Teranet acted solely as a provider of services to the Province to enable the Province to provide an electronic land registry system.

The Court of Appeal further noted that land surveyors are under no obligation to register or deposit plans of survey on title. A land surveyor has at least three different ways to prevent registration or deposit of a plan of survey it has prepared being registered or deposited in the electronic system, and thus to maintain its copyright in such plan of survey. In effect, any land surveyor who accepts a retainer to prepare a plan of survey for registration or deposit in the electronic registry system must accept that it will be giving up any claim to copyright with respect to that plan of survey.

There is a similar controversy that has yet to be finally resolved respecting the ownership of copyright in

product monographs submitted to Health Canada as part of the process for obtaining approval to market a pharmaceutical product in Canada. The issue has come up in preliminary stages of several actions[2] but the question has never been determined after a trial. It will be interesting to see if the decision of the Ontario Court of Appeal results in the question of copyright in pharmaceutical product monographs being revisited.

It is also interesting to compare the Ontario Court of Appeal's decision to a slightly earlier decision of the Alberta Court of Appeal in Geophysical Service Incorporated.[3] Geophysical Service Incorporated or GSI is in the business of conducting offshore seismic surveys in the Canadian Arctic and Atlantic regions. The manner in which these seismic surveys are conducted is regulated under federal and provincial legislation[4] or Regulatory Regime. In order to carry out its surveys GSI had to obtain permits to do so from a number of federal and provincial boards. A condition of these permits was that GSI would provide the seismic data collected to the board that issued the permit. These data would then be made available to third parties by the boards under the authority of the relevant legislation. GSI argued that in providing copies of these data to third parties, the boards violated its copyright in the data. The Alberta Court of Appeal approached the question as one of proper statutory construction using the federal legislation in its analysis. The court concluded that the proper construction of the legislation was that any of GSI's copyright rights had to give way to the implied exception set out in the Regulatory Regime – in effect a form of licence. It does not appear that the issue of s. 12 of the *Copyright Act* was argued by any of the parties.

Materials have been filed[5] in the *Keatley* case with the Supreme Court of Canada for permission to bring an appeal in that Court to review the decision of the Ontario Court of Appeal, but the Supreme Court has not yet decided whether it will grant this permission.

The decisions in *Keatley* and GSI may prove to be the tip of the iceberg. All kinds of documents with content that might be copyrightable are filed with government agencies which later make those documents available to the public, including applications for patents of invention and registration of trademarks. Whether these decisions result in a flurry of litigation over the extent of the application of s. 12 of the *Copyright Act* remains to be seen.

by Peter Wells

[1] Keatley Surveying Ltd. v. Teranet Inc. 2017 ONCA 748; 139 OR (3d) 340
[2] *E.g. Pfizer Canada Inc. v. Attorney General of Canada* (1986), 10 CPR (3d) 268 (FCTD) and Glaxo Canada Inc. v. Apotex Inc. (1996), 64 CPR (3d) 191 (FCA)
[3] *Geophysical Service Incorporated v. EnCana Corporation,* 2017 ABCA 125 Permission to appeal to the Supreme Court of Canada was denied – SCC Case 37634
[4] The constitutional issues relating to the Provincial boards is beyond the scope of this Bulletin. The provincial

boards had been authorized by mirror federal and provincial legislation.
[5] SCC case 37863

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.