COPYRIGHT & THE CROWN

When the government is involved in the collection and dissemination of works subject to copyright, there are risks to copyright that can arise outside the *Copyright Act*.

Legislation enacted for very different purposes can have sometimes detrimental consequences for copyright in works submitted to government authorities.

For any business, the inadvertent loss of copyright in works submitted to government can be damaging to any future revenue stream related to those works. Depending on the value of the works, it may be prudent to consider the governing legislation and/or attempt to negotiate an agreement with government respecting copyright prior to filing proprietary documentation with the crown. The nature of the risk may also inform the scope and content of what a business selects for filing with a government authority.

For new business models that rely on documents made available to the public by government, it can be critical to consider who owns copyright in the material and whether it can be freely copied without obtaining further consents.

As these cases demonstrate, it can be especially problematic when government changes the technical means by which it makes such works available to the public. Unexpected questions can arise.

Keatley Surveying v. Teranet

In *Keatley Surveying* v. *Teranet* (2017 ONCA 748), the Ontario Court of Appeal held that the provincial crown owns copyright in plans of survey deposited or registered in provincial land registry offices. This decision was released in September 2017 and was an appeal from a trial judgement issued in May 2016. To my knowledge, the parties have not sought leave to appeal to the Supreme Court.

At both the trial and appeal level, the outcome rests entirely on statutory interpretation. In particular, it relies on the interaction of "crown copyright" under the *Copyright Act* and various provisions of *Land Titles Act* and the *Land Registry Act*.

Crown copyright is defined by section 12 of the *Copyright Act* which states:

> Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or 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 that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

Based on the foregoing, the court concluded that the crown may acquire copyright in works by two means: (1) works prepared under government direction and control; or (2) works published under government direction and control.

Since the survey plans at issue were prepared by private surveyors, the court did not give further consideration to the first branch of the test. Instead, it focused on

whether they were "published under government direction and control".

With respect to the latter branch of the test, the court first noted that the *Copyright Act* defines "publication" as making copies of the work available to the public. However, it found that mere "publication" of a work by government is not sufficient for the crown to acquire copyright. Instead, the court found that the publication must also satisfy a "direction and control" test.

While the "direction and control" test is not limited in scope, the court concluded that one must consider "the nature of the 'rights' in the property held by the crown when the crown published the property" and the "more extensive those rights", the stronger the inference that the publication was under the direction and control of the crown.
Based on its review of the *Land Titles Act* and the *Land Registry Act*, the court concluded that the crown did acquire copyright in registered plans of survey based on the following factors:

- the crown is obliged to maintain custody and control of registered plans of survey;
- the crown must make copies of registered plans of survey available to the public upon request;
- surveyors cannot amend registered plans of survey;
- the crown can freely amend registered plans of survey without the consent of the surveyor;
- surveyors cannot place any copyright notice on registered survey plans; and
- surveyors can prevent their survey plans from being registered with the crown by simply applying a copyright notice or refusing to sign the declaration required to be filed with any registered plan of survey.

While both the *Land Titles Act* and the *Land Registry Act* contained declarations that plans of survey are the "property of the crown", the court did not rely on those declarations. Although it made no specific finding in this regard, these declaratory provisions are likely *ultra vires* since the federal government has exclusive jurisdiction over copyright under the Canadian constitution. It therefore seems unlikely that provincial statutes can directly transfer copyright ownership from one person to another.

Of course, the weight of history favoured the provincial government's position from the outset. The government has made registered plans of survey available to the public upon request for some 200 years. Although operated for a profit, Teranet acts as an agent of the crown.

However, the difference with Teranet is that those plans of survey have now been transformed into a digital format and made available to the public on a scale not contemplated when the legislation was enacted. In copyright law, there is a vast difference between making the occasional single paper copy of a work available upon request and making a vast database of works available to the public for their free exploitation for commercial profit. Such a change of technological circumstances is even more problematic in the next case.

Geophysical Service Incorporated v. EnCana Corporation

In *Geophysical Service Incorporated* v. *EnCana Corporation* (2017 ABCA 125), the Alberta Court of Appeal held that the federal crown has an implied license to publish, and to license others to publish, seismic data submitted to the National Energy Board ("NEB") and other boards without any regard for copyright in the data. This decision was released in April 2017 and was an appeal from a trial decision released in April 2016. Leave to appeal to the Supreme Court was denied in November 2017.

Again, at both the trial and appeal courts, the outcome rests entirely on statutory interpretation. However, the court did not rely on crown copyright. Instead, it found that, to avoid absurdity, the more specific legislation governing the boards applied over the more general provisions of the *Copyright Act*. Given that both statutes were enacted by the federal government, there was no concern about any provisions being *ultra vires*.

Under the governing legislation, the NEB and other boards granted licenses to third parties to conduct seismic explorations of Canadian "frontier lands" and, in exchange, required a deposit of the seismic data collected. By statute the deposited seismic data was treated as confidential by the boards for at least five years after which it was entitled to "disclose" the data to the public.

In the early days, seismic data was recorded on large sheets of paper or mylar that were 8 feet long and 4 feet high. When it was "disclosed" to the public, no photocopiers were available. Instead, the public could only print off an 8" x 11" part of these large sheets with a microfiche reader. It is also expected that, in these early days, the underlying data was often collected by fairly rudimentary mechanical means.

Today, sophisticated technology is employed in the collection and analysis of seismic data and to record the data in digital formats. At some unspecified point in its history, the NEB developed the practice of making digital "copies" of deposited seismic data available to the public upon request without any restrictions on its use. And some members of the public then reproduced and sold copies of the seismic data in competition with the copyright owner.

The primary question in this case was whether the "disclosure" authorized by statute further authorized the government to provide "copies" of the seismic data to the public. However, a preliminary issue with critical importance in this case was whether the seismic data was entitled to copyright protection at all.

In law, data was generally not entitled to copyright protection since it was presumptively not considered to be the product of human skill or judgment. However, considerable evidence was submitted at trial in this case respecting the modern process used to collect and process seismic data. In the end, the trial court accepted that even the raw unprocessed seismic data was entitled to copyright protection as a compilation work since the selection and arrangement of the collected data was, in fact, the subject of human skill and judgment. This finding was not challenged on appeal, but is critical to understanding why the governing legislation likely refers only to "disclosure" of seismic data and does not address the issue of making copies. The drafters of the legislation likely assumed that seismic data was not entitled to copyright!

Unfortunately, the appeal court does not address the distinction between confidentiality and copyright. Although these rights can overlap in a single work, they are two distinct property rights at law and the loss of confidentiality does not inevitably lead to the loss of copyright. After publication, a book placed in a library is no longer confidential, but it still enjoys copyright. The library copy may be circulated, but it cannot be copied in its entirely without the consent of the copyright owner.

Instead, the court determined that the governing legislation was a complete regulatory regime whose stated purpose was to both collect and disseminate seismic data. As a result, the word “disclosure” must be interpreted in a manner which “readily allows the data to be used” and permitting the data to be copied “squares with that intention”. Of course, this ignores the fact that seismic data was previously “disclosed” in a much more limited fashion and complete “copies” were not made available after disclosure. Unfortunately, there is also no discussion in the decision about why digital copies of the data are necessary for it to be used. While making available digital copies of the seismic data would certainly more efficient for the recipients, copyright owners generally have no obligation to provide third parties with convenient access to complete digital copies of their works even if the subject matter is in the public domain.

In sum, the court concluded that the only reasonable interpretation of the word “disclose” was to confer on the boards both: (a) the unfettered right to disseminate the deposited seismic data after expiry of the privilege period; and (b) the right to grant to others both access and the opportunity to copy such data without limitation. In other words, the court found that copyright in the seismic data deposited with the crown was unenforceable.

Conclusion

These 2017 court decisions demonstrate that copyright is a complex creature of statute and the development of new technology can profoundly change the impact of statutory provisions over time.

These cases also demonstrate that business dealings with the government can threaten copyright in unexpected ways. Sometimes counsel have to look beyond the *Copyright Act* for answers.

Disclaimer: The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.