

Copyright Basics for Surveyors

By

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A surveyor has contracted to provide a subdivision design for a developer. The fee for the service was \$15,000 with three equal payments to be made during the course of the services. The surveyor was paid \$5,000 for preliminary field work (e.g., boundary survey, topography, etc.) and \$5,000 upon completion and approval of the preliminary design. The final payment was to be paid upon setting the corners and submitting the final plan. However, right after the approval of the preliminary design, the client cancels the contract. Three months later, the surveyor discovers the client had found another surveyor who charged \$500 to set the corners and seal and submit the final plan. The final plan had a few minor modifications from the preliminary plan.

In another case, a surveyor has prepared a retracement plat and survey report on a parcel of residential property in preparation for the buyer obtaining a mortgage. The plat and report are delivered to the lender. Because of the buyer's bad credit, the sale falls through. Two months later another buyer is found for the property. The new buyer seeks financing at another bank. Rather than order a new survey, the Realtor obtains a copy of the previous plat and report from the first bank and passes the copies on to the new bank so the next buyer can obtain financing.

In a third scenario, a paralegal in a metropolitan area provides a service whereby she provides copies of recorded maps for any parcel in the metropolitan area for a flat fee of \$45. This includes tax maps, subdivision plans, and retracement surveys recorded in the county surveyor's office.

These three scenarios and similar copying of a surveyor's work products without permission have been repeated many times over across the country and are troubling to the surveyor. Surveyors earn a living selling information and professional opinions. The surveyor's information and opinions have value. Consequently, when information and opinions are copied and transferred to others without compensating the surveyor (author), the surveyor has been denied a fee or chance to seek a fee that the surveyor may have been entitled to. In some cases, the surveyor could have obtained damages or other remedies under the copyright laws of the United States. Consequently, it is in the surveyor's interest to be knowledgeable about certain basic applications of copyright law. Copyright law will be explored using typical questions asked by surveyors.

What is covered by the copyright laws? Copyright laws provide protection to any original works fixed in a tangible medium of expression from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.¹ In other words, an author's original work that has been codified in a tangible manner (writings, sculptures, photographs, computer programs, vocal recordings, plans, paintings, films, and broadcasts) automatically and inherently have copyright protection. The United States Supreme Court stated: "[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."²

What typical surveying work products are protected under the copyright laws? Design plans, subdivision plans, reports, letters, opinions, and plat notes would ordinarily be protected by the copyright laws. A retracement plat would not ordinarily be protected. The reason is that the fundamental concepts adhered to in a retracement survey would be stretched to the point of being ludicrous if the retracement plat could be labeled "an original work" while the surveyor (author) maintains the retracement plat correctly depicts boundaries that were located by "following in the footsteps of the original surveyor." Simply stated, a retracement plat, if drawn from a properly performed retracement survey, should be a close if not exact copy of the original surveyor's plans or notes. The same analogy could be applied to the revised description prepared by the surveyor from a retracement survey. In addition, a topographic plat would not ordinarily be protected since it merely shows a compilation of facts. A compilation of facts are not ordinarily protected by the copyright laws.³ However, the notes, certification, legend, and other margin information on both the retracement plat and topographic plat may be covered under the copyright laws.

Are all surveyors and their work products, other than retracement plats, topographic plats, and descriptions, protected? Not necessarily. Original, United States Government work is ordinarily not protected by the copyright laws.⁴ Therefore government surveyors who prepare documents for the United States would not have their work protected under the copyright laws.

¹ This is a codification of the definition found in 17 U.S.C. § 102

² *Feist Publications, Inc., v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 350 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

³ *Feist Publications, Inc., v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 350 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

⁴ 17 U.S.C. § 105

Are the lines on a plan protected or just the text on the plan? The answer depends on the circumstances. As a general rule, the arrangement of lines may be copyrighted if the arrangement of the lines is an original creation of the author. Consequently, contour lines that depict actual elevation differences will probably not be covered under the copyright laws (e.g., facts expressed in a typical form), while lot lines on a subdivision sketch plan will likely be covered.

Do I need the “© 1999 [My Name]” to have copyright protection? No, not since 1989 with the adherence of the U.S. to the Berne Convention has a notice been required.⁵ The notice of copyright is no longer required for the document to be protected under the copyright laws (though certain older works would require the notice).⁶ The surveyor’s written or graphical work products are protected the moment the work is put in a tangible form so that it is perceptible either directly or with the aid of a machine or device.⁷ However, because most people are not familiar with the change in the copyright law, it is often advisable to place the notice of copyright on work products to prevent violation of the copyright law by the uninformed. Also, copyright notice gives the name of the person who can give permission for copying. Finally, copyright notice may allow for increased damages if a person improperly copies the work that includes a copyright notice.

Does the previous answer mean that when a government official tells me to remove the copyright notice from my work product before they will approve it, accept it, or record it, that the work product continues to have copyright protection? Yes, the work product would continue to enjoy the benefits of protection under the copyright laws even though the copyright notice is not on or has been removed from the work product. To avoid protection under the copyright laws, the author would have to put a statement of general permission to copy on the work product itself or otherwise make known the document may be copied or displayed at will.

If my work is protected under the copyright laws automatically, why do I hear about having to submit forms to the Government and having to pay a fee? You must submit a completed form, copy(ies) of your work, and a fee in order to register your copyright (not create the copyright). Copyright is automatic, registering the copyright is not. Registration is recommended to give public notice of copyright, obtain a certificate of registration, improve the chance for statutory

⁵ Berne Convention, effective 1 March 1989.

⁶ 17 U.S.C. §§ 401-405; Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

⁷ Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

damages and attorney's fees if a copyright violation is litigated, and, if registration occurs within five years of publication, provide for prima facie evidence of ownership in a court of law.⁸

Can I make copies of a document if I correctly cite the source of the copy?

No, plagiarism is not the same as a copyright violation. The fact that the author is correctly cited may alleviate the charge of plagiarism (which deals with manners and moral obligations) but not the copyright law (which deals with the legality of the act).

Once the document is recorded in a public place, does it lose copyright protection? No. Placing a plan or other document in the register of deeds' office or a county surveyor's office no more removes copyright protection than placing a book with copyright protection in a public library.

Does the previous question and answer mean that recorded deeds are protected by copyright laws? Probably not, though there are certainly exceptions such as a deed recorded in New Hampshire that is written in poetry form. Ordinarily, widely available or frequently used forms are not protected by copyright laws. Facts are not protected by copyright laws.⁹ A deed is ordinarily a combination of facts inserted into a form and those facts typically are not protected by copyright laws. A modicum of creativity is required to gain protection.¹⁰ However, if the deed also included a survey report as an attachment, the survey report may be protected by copyright laws. Copyright protection extends only to creativity elements of the work.¹¹ Furthermore, the vast majority of deeds copied would fall under the "fair use exception" even if the deed itself was copyrighted.

Assuming a development plan recorded in the registry of deeds is copyrighted, can a surveyor copy the plan in order to have the information so that he can retrace the boundaries of the lot shown on the development plan? Yes, the surveyor can most likely copy the plan or at least part of the development plan

⁸ 17 U.S.C. § 410; Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

⁹ Feist Publications, Inc., v. Rural Telephone Service Company, Inc., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

¹⁰ Feist Publications, Inc., v. Rural Telephone Service Company, Inc., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

¹¹ Feist Publications, Inc., v. Rural Telephone Service Company, Inc., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

containing information relevant to the retracement survey. This use would fall under the research exception within the fair use doctrine. In determining if the surveyor's use is fair use for purposes of research, the statute considers: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹² The courts tend to stress the fourth item.

Assuming there is copyrighted work recorded within the registry of deeds, isn't the registrar violating the copyright laws when she makes a microfilm backup or makes a copy of the document for someone that requests a copy?

No, the registrar is not likely violating the copyright law. 17 U.S.C. § 108 provides broad protection for libraries and archives. By a reasonable interpretation, the recorder of deeds' office is an archive. An archive is allowed to make a backup copy. Furthermore, 17 U.S.C. § 108 states "it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce ... [a] copy ... of a work, or to distribute such copy ... [where] the copy ... becomes the property of the user, and the library or archives has had no notice that the copy ... would be used for any purpose other than private study, scholarship, or research..."¹³ Accordingly, unless the registrar has reason to believe the person intends to violate the copyright laws, the registrar would have no reason not to provide a copy or allow a copy to be made upon request. What many registrars fail to do and should do is post the notices required by the copyright act, 17 U.S.C. § 108, above the copier and on copies they make for others.

So, how can I copy a document that is protected by copyright laws? You can copy documents that are protected by copyright laws if the copying falls within an exception to the copyright laws such as the fair use doctrine or permission of the author is given. Copying is allowed under the fair use doctrine for such reasons as: criticism, comment, news reporting, teaching, scholarship, or research.¹⁴

I recently read a survey report prepared by another surveyor. I really like how the surveyor (author) wrote several sections in his report. Can I use these sections without her permission so long as I make some changes to the

¹² 17 U.S.C. § 107

¹³ 17 U.S.C. § 107

¹⁴ 17 U.S.C. § 107

wording? No, changing some of the wording by itself is not enough to remove copyright protection where it is clear that the changed text is a derivative of the original work.¹⁵ However, facts, ideas, methods of operation, and systems presented in the text are not copyrighted.¹⁶ Furthermore, certain copying may be allowable if the copying would fall under the fair use doctrine.

A Realtor recently copied a five-year-old mortgage loan inspection (MLI) I did for a former owner of the property. The Realtor made a copy of the MLI and sent the copy to the bank rather than request another MLI from me or seek my permission to copy the original MLI. Did the Realtor violate the copyright law? That is not an easy question to answer and may hinge on certain factors such as whether the new buyer was charged for the MLI copy or the MLI can be copyrighted. If all or part of the MLI is copyrighted, there are factors that appear to suggest that a copyright violation occurred: The copy was used in a commercial nature. The surveyor (author) had an expectation interest that she or he could profit from their earlier work. It was originally prepared for a commercial purpose. The entire MLI was copied rather than a small part. Finally, the effect of the copying was to deny the surveyor a potential market for additional services or the value of any derivative work arising from the previous work product (MLI).¹⁷

Changing the previous question slightly, would it matter if the Realtor had sent to the bank the original five-year-old mortgage loan inspection (MLI) I gave to the former property owner rather than sending a copy? Yes, it does matter. There is no violation of the copyright laws if the original document is sent rather than a copy. If the Realtor has an original document that you provided to the former landowner, the Realtor is free to convey the original document to the bank without violating the copyright law. This situation would be no different from the situation where you might give someone a novel to read that you bought at a bookstore and have finished reading (known as a first sale doctrine).

I often copy one or two paragraphs from a boundary law book to give to attorneys and others in order to help explain the basis for the evidence I used or why I placed a boundary in a certain location. Is this a violation of the copyright law? No, such copying would probably fall under the fair use doctrine. The fair use doctrines certainly applies where all of the following are present: the

¹⁵ Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

¹⁶ Feist Publications, Inc., v. Rural Telephone Service Company, Inc., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 USLW 4251, 68 Rad. Reg. 2d (P & F) 1513, 1991 Copr.L.Dec. P 26,702, 121 P.U.R.4th 1, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889 (1991)

¹⁷ 17 U.S.C. § 107

amount of material copied or used is a small part of the entire document, no profit is made from the use of the copied material, the economic loss to the copyright holder is insignificant, and there is no intent to publish or display the copied material to the public at large.

If I write an article or a letter to the editor that is published in a professional magazine (as I intended it to be), does the publisher gain the copyright? No, not unless the copyright was specifically transferred. Copyright must be transferred in writing.¹⁸

I gave a person permission to make a copy of my survey report. Later, I found out that person sold that copy to another person. Is that action a violation of the copyright law? Again, the answer to this question can hinge on certain specific facts. However, as a general rule, a person that has a lawful copy of a document may dispose or sell the lawful copy.¹⁹ It would be wise to only give a limited or conditional permission to copy in any situation where distribution or sale of the lawful copy would be cause for concern.

I have a unique logo, sort of a combination north arrow, caricature, and quaint phrase that I have used for many years on all my plans. Recently, I noticed that a former employee is using this logo on his plans. Can I prevent my former employee from using my logo under the copyright laws? No, a logo would have to be protected as a trademark under the trademark laws (unless it is a unique art form). Similarly, inventions, processing methods, and other items you build or use would have to be protected under the patent laws.

I saw a great article on the internet. It was obviously put there for people to read. I downloaded the article and sent a digital copy of this article to several people by e-mail. Where something is so easy to copy and it appears to be begging to be copied, surely the copyright laws wouldn't apply to this situation would it? Absolutely yes! The ease of copying or the fact the document is in digital form on the world wide web does not deny digital material all the protection enjoyed by paper media under the copyright laws.

That answer's ridiculous, how would the author of the web page expect the reader to spread the message found in his article? You send your friends the web address. If the author doesn't mind you sending your friends a digital copy of

¹⁸ Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

¹⁹ 17 U.S.C. § 109

the article, it is a simple matter for the author to give permission by making a simple statement such as: “send a copy of this article to your friends.”

I’m the CAD operator and make a lot of plans and prepare reports for my employer in the course of my employment. Who has the copyright of the plans and reports, my employer or me? Your employer has the copyright. When you are employed and during the course of your employment you prepare an original work, the employer holds the copyright (“work for hire” v. “contractor”).²⁰

As a surveyor, when I prepare certain work products on behalf of a client, who holds the copyright? Ordinarily, the surveyor holds the copyright for all documents, plans, and other original works prepared by the surveyor or the employee.²¹ This answer presumes the surveyor is in the legal relationship of a client/contractor and not an employer/employee. The copyright can be assigned to the client by contract either prior to the creation of the work product or after the creation of the work product. Consequently, a sophisticated client will often require that the contract assign to the client any copyright in the surveyor’s work products.

What if I give the client all the original survey documents so I have no possession or ownership of the documents. Does the client have the copyright in the documents? Transfer, possession, or ownership of the document by other than the author does not remove the copyright from the author of the work or convey any rights in the copyright from the author to others.²²

I own a business with the name of [XYZ] and Associates. Can I register a copyright under this business name even though it is not a legal name? Yes, you can register a copyright under a pseudo-name. However, you must make sure you note that fact on the registration form.²³

When I went to register my copyright of a subdivision design plan, I didn’t see a plan category listed. What copyright form should I use when registering my copyright? Plans are registered in the same manner and the same form as “pictorial, graphic, and sculptural works” are registered.²⁴

²⁰ 17 U.S.C. § 101; Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²¹ 17 U.S.C. § 101; Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²² Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²³ Frequently Asked Questions, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²⁴ Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>; Use Form VA

How long is my work protected under the copyright laws? Work done since 1989 is protected for the author's life plus 70 years.²⁵

How do I transfer my copyright? Transfers of a copyright must be done in writing and signed by the author or owner of the copyright.²⁶ In some cases, transfers can occur by will or intestacy. A copyright is personal property and may be governed by operation of state law dealing with personal property.

What do I do if I want to pursue what I believe to be a violation of the copyright laws? First you must register your work with the United States Copyright Office.²⁷ In other words, even though your work is protected at the outset, you must register the copyright. Second, you must begin a lawsuit by filing a complaint in the United States District Court where the violation occurred or where the defendant lives or works. It is strongly recommended that an attorney familiar with litigation and intellectual property law be retained for copyright litigation.

Lets assume someone takes one of my reports, copies it, and sells the copy for \$300. I would be lucky to find a lawyer that would write a letter for \$300 or less. Is litigating copyright infringements like so much other litigation in the United States – it will cost more to obtain justice than justice rewards? Not necessarily. A violation of the copyright law could cost the offender the loss of any profits, payment of damages, and payment of your attorney fees.²⁸ If registration is made prior to an infringement of the work or within 3 months after publication of the work, then damages, profits, and attorney's fees will be available to the copyright owner who litigates the claim. However, if the registration does not occur in that time period, only an award of actual damages and profits will be made to the copyright owner.²⁹ It is worth noting that damages are not contingent upon intent. "Innocent" or negligent copying will allow for damages.

How long do I have to file a lawsuit? You have three years from the time of violation.³⁰

What is required for me to register my copyright? To register your work, send:
1) a properly completed application form;³¹ 2) a nonrefundable filing fee of \$20

²⁵ 17 U.S.C. §§ 302-304; Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²⁶ Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

²⁷ 17 U.S.C. § 412

²⁸ 17 U.S.C. §§ 501-506

²⁹ 17 U.S.C. §§ 411-412; Circular 1, United States Copyright Office <<http://lcweb.loc.gov/copyright/>>

³⁰ 17 U.S.C. § 507

per application, and 3) a non-returnable copy(ies)³² of the work being registered to the following address:³³

Library of Congress Copyright Office
Register of Copyrights
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

These questions and answers were meant to provide a general overview of copyright law. Before seeking the resolution or answers to a particular situation you should consult with an attorney — even if the situation may appear similar or the same as a question stated. The copyright law periodically changes and its application is often fact sensitive. Be sure to seek counsel from an attorney familiar with intellectual property law. For those surveyors interested in studying the exchange of information and pertinent law, especially as it relates to geographic information systems, the University of Maine offers a course on information systems law and an advanced degree in the area of spatial information engineering. For articles on law information policy and spatial databases, readers are invited to visit www.spatial.maine.edu/tempe/tempe94.html or www.spatial.maine.edu/onsrud.html For more information about the program at the University of Maine contact Dr. Kate Beard at 207-581-2147 or beard@spatial.maine.edu.

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I would like to give a special thanks to Dr. Harlan Onsrud for his review and comments he provided during my preparation of this document.

³¹ For a text with or without diagrams (such as a survey report) use Form TX. For plans use Form VA.

³² The number (one or two) depends on the type of work being registered.

³³ 17 U.S.C. §§ 408-410