SURVEYS & COPYRIGHTS: WHAT ARE THE ISSUES?

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I. INTRODUCTION

The overall question of copyright protection available to survey plats has numerous legal issues but also many marketplace issues. The surveyor and his work are important to purchasers and borrowers of property, the lending institutions, and the title industry. It is important that the surveying profession be compensated for its work and that it has sufficient work to maintain its quality, supported by an adequate revenue stream. Obviously, the title industry is dependent upon high quality surveys in connection with the transfer and insurability of title, while borrowers and lenders similarly want an assurance as to the integrity of their property and collateral. At the same time, the borrower seeks to reduce his closing costs, close expeditiously and avoid economic waste. The lender has an interest in reducing total closing costs, having relevance both to statutory limitations and marketability of its loans. Thus, one is important to the other with some consistent goals and others at odds.

This paper seeks to simply identify some of the legal and market issues, leaving for another day a determination as to their answers. The Texas Society of Professional Surveyors has obtained one legal opinion, and the Texas Land Title Association has appointed a task force to study the issue. In a sense, the land title industry is in a bit of a neutral position but subject to countervailing pressures regarding the reuse of surveys. At the present time, there is significant pressure to reuse surveys, including a regulatory requirement that surveys be reused in connection with certain residential refinances. Copyright protection for surveys could force the parties into a "Catch 22" decision as to which law to violate or which party to refuse to accommodate. While copyrightability of survey plats might not only increase revenue due to requiring new surveys in connection with these transactions, it might also lead to increased consumer costs in addressing copyright issues at the beginning of the initial retention of a

surveyor. A consumer would need to negotiate written agreements or shop for surveyors willing to provide expanded rights to the borrower. Certainly a new element of competition could be introduced into the retention of surveyors.

In any event, the issue leaves much to think about. As Mark Twain once noted, "Only one thing was impossible for God: to find any sense in any copyright law on the planet." Mark Twain also added "Whenever a copyright law is to be made or altered, then the idiots assemble." Possibly a reasonable approach to this issue may avoid an assembly of idiots.

II. IS A SURVEY COPYRIGHTABLE?

A. Is the work "original"?

The most recent case relevant to this issue has been decided by the Second Circuit in *Sparaco v. Lawler, et al.*, 303 F.3d 460 (2nd Cir. 2002). The court addressed the copyrightability of an original site plan prepared by a surveyor, which site plan included both existing physical characteristics of the site and proposed physical improvements. The site plan was prepared for submittal to the town of Ramapo, New York in connection with required building approvals. The site plan consisted of a depiction of the grade and contours of the land, a proposed location for the building, and the proposed location of utilities. Subsequently, the surveyor was terminated, and an amended site plan was utilized in connection with city approval. The surveyor, Sparaco, filed suit for a number of claims, including copyright infringement.

The district court (60 F. Supp.2d 247 (S.D.N.Y. 1999)) entered summary judgment finding that the site plan was not copyrightable, specifically noting that items like elevation measurements were not original and not copyrightable. However, the district court did determine that there could be issues as to the copyrightability of certain creative elements related to the proposed design which would require a trial. In reaching that decision, the court addressed the merger doctrine which holds that the expression of an idea, i.e. that which is normally copyrightable, may not be protected by copyright if there are so few ways of expressing the idea

that the expression and the idea merge. The court determined that the same issues of fact to be decided in connection with the originality argument would also be a part of the analysis of the merger doctrine claim.

On appeal, the Second Circuit vacated and remanded the district court's decision. However, the court affirmed summary judgment as to the lack of copyrightability in the site plan to the extent it identified existing factual information about the site. The court noted that the particular site plan employed standard cartographic features without originality, including a basic survey of the parcel of land, portraying boundaries, zoning districts, plot lines, abutting parcels, and public streets abutting or crossing the site. It also contained a topographical survey that showed elevation, with contour lines, and depicted the location, elevation, size and slope of existing physical structures such as utility lines, drains, valves, hydrants and sewers. On the other hand, the appellate court disagreed with the district court's analysis regarding the proposed improvements. The court found that the Sparaco site plan specified more than vague, general indications of shape and placement of the elements, but rather provided detailed specifications for preparation of the site and that part was subject to copyright protection. Thus, in essence, to the extent the survey plat reflected a specific expression and realization of ideas for the improvement of the property, it was subject to copyright protection -- but not as to the depiction of the existing characteristics of the property.

The Fifth Circuit has addressed the requirement of originality in maps in *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992), in which the court upheld protection for a countywide composite real estate map as an original factual compilation. The Fifth Circuit followed an earlier Supreme Court decision, *Feist Publications, Inc. v. The Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991) which tended to restrict copyrightability of factual compilations. Accordingly, some courts have denied copyright protection for maps on the grounds that the items selected are completely obvious and require no ingenuity whatsoever in

their selection, such as the selection of cities, *Andrews v. Gunther Publishing Co.*, 60 F.2d 555 (S.D.N.Y. 1932), or an outline map of the United States with state boundaries, *Christianson v. West Publishing Co.*, 53 F. Supp. 454 (N.D. Cal. 1944), *aff'd*, 149 F.2d 202 (9th Cir. 1945). In *Mason*, the maps pictorially portrayed the location, size, and shape of surveys, land grants, tracts and various topographical features within the county. Evidence demonstrated that *Mason* used creative selection, coordination, and an arrangement of the information he gathered to provide a pictorial and graphic map possessing sufficient creativity. The *Mason* court treated creativity as a subset question of originality, but the analysis was still the same – a determination that the author made choices that resulted in an independent expression entailing at least a minimal degree of creativity.

Feist stands for the proposition that the compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. 499 U.S. at 348. *Feist* addressed a directory and found protection only if the directory was a product of the compiler's selection or arrangement. "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 499 U.S. at 358.

Again, arguably, a survey plat has as its goal the opposite – selection and arrangement are dictated by standards and specifications, and a novel or creative depiction would be frowned upon. Just as directories utilizing factual information and arranging them alphabetically are not protected, is each survey plat subject to the same standardized and logical arrangement of factual elements? In Texas, the Manual of Practice for Land Surveying specifies categories for surveys, including the Land Title Survey. The specifications note the purpose to locate the record

location of real property lines, easements, and visible improvements and further specifies a requirement to mark monuments. § 10 states:

> Land title surveys shall be represented by a reproducible plat, map or drawing as suitable scale to depict the results and details of the field work, computation, research and record information, as compiled and checked.

Finally, ¶ 10.19 states as follows:

> The original and reproducible copy of the survey map, plat or drawing, shall be retained by the surveyor in his files. The client shall be furnished an agreed number of the survey map, plat or drawing.

Again, § 663.19 of the PROFESSIONAL LAND SURVEYING PRACTICES ACT specifies the requirements of a plat, including the marking of monuments, the defining of boundaries and the identification of courses. Standardization and consistency in work product is a goal of the surveyors work, as is an accurate and clear depiction of the real property. This goal arguably cuts against the concepts of copyrightability in original and creative works. As noted in *Feist*, copyright protection was not available, if the selection of information was dictated by state law and its arrangement was "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." 499 U.S. at 363.

The Fifth Circuit previously addressed a related issue regarding the copyrightability of research in *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) in which the court refused copyright protection to an author's research despite the "efforts involved in discovering and exposing facts." The court therein stated "there is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection." The facts are simply not the work of an author. *See Nimmer on Copyright* §2.11[E] and §2.03[E].

Note that 17 U.S.C. §101 defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged."

However, forms of expression dictated by functional considerations or by state law or by other rules of standardization may deny copyright protection to factual compilations as lacking necessary creativity. *See Nimmer on Copyright*, §2.01[B]. *See also* 37 C.F.R. §202.1(d) which denies copyright protection to "works consisting entirely of information that is common property containing no original authorship, such as, for example: standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists of tables taken from public documents or other common sources."

B. Are there so few ways of expressing the idea that the expression and the idea merge?

While copyright protects expression, ideas are not protectable. In some cases, there is a merger of idea and expression such that a given idea is inseparably tied to a particular expression. *Nimmer on Copyright §13.03(b)(3)*. This concept has given rise to the merger doctrine to avoid granting copyright to the idea itself. For instance, the First Circuit, in *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504 (5th Cir. 1996), has denied copyrightability to any given form of expression of an idea if the nature of the idea is sufficiently narrow so that only a limited number of forms of expression of the idea are possible. The court determined that "the subject matter would be appropriated by permitting the copyrighting of its expression."

The *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), *cert. denied*, 498 U.S. 952 (1990) is one illustration of the merger doctrine. In that case, the plaintiff compiled an original map or a proposal to locate a natural gas pipeline by utilizing the United States geographical survey topographical map and adding the lines and mile markings for its pipeline. The court determined that the idea of the location of the pipeline and its expression was inseparable and not subject to protection. *See also Project Development Group, Inc. v. O.H. Materials Corp.*, 766 F. Supp. 1348 (W.D. Pa. 1991) and *Sumner Mfg. Co. v. Midco Mfg. Co.*, 29

U.S.P.Q.2d 1230 (S.D. Tex. 1993). However, the difficult concept is whether or not the merger doctrine precludes copyrightability in the first place or is simply a defense to a charge of infringement versus substantial similarity. The first would prohibit a claim of infringement in the first place, even where the survey plat was simply copied. The latter would prohibit the copying but not use and reproduction.

C. Is there some creativity involved?

Creativity is a second prong of the copyrightability, often distinguished from originality. Unless a work evidences some creative authorship, it cannot by definition be regarded as a work of art. *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968) notes the requirement of originality should be distinguished from the requirement of creativity. Creativity refers to the nature of the work itself while originality refers to the nature of the author's contribution to the work. Thus, a work may be entirely the product of a claimant's independent efforts and hence original, but may nevertheless be denied protection as a work of art if it is completely lacking in creativity. *See Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988).

The issue regarding survey plats would appear to also be one of creativity, not just originality. 17 U.S.C. §102(a)(5) of the Copyright Act specifies as copyrightable "pictorial, graphic and sculptural works." 17 U.S.C. §101 defines these to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, and models." Copyright office regulations have interpreted "maps" to include "all published and graphic representations of area, such as terrestrial maps and atlases, marine charts, celestial maps and such three-dimensional works as globes and relief models." 37 C.F.R. §202.9. Does a survey plat fit within these categories? Maybe, but maybe not if it is considered a literal depiction of a piece of real property.

17 U.S.C. §101 makes clear that architectural plans and drawings may be protected by copyright. *See also Attia v. Society of the New York Hospital*, 201 F.3d 50 (2d Cir. 1999). Again, whether or not this protection logically extends to survey plats is an open question. Architectural plans obviously include the elements of originality and creativity. One might argue that a survey plat is simply a diagram of factual information with its goal being little variation from standards and specifications utilized by the industry. Originality and creativity may be the antithesis of a good survey plat, and ideally every survey plat of a particular piece of real property would be identical in the portrayal of the facts related to the property. Is not a survey plat simply one form of describing the factual nature of the property, the same as written textual material, electronic media or the like? In *Mid America Title Co. v. Kirk*, 59 F.3d 719 (7th Cir.), cert. denied, 516 U.S. 990 (1995), a title commitment was not entitled to copyright protection. The selection and arrangement of preexisting facts was not sufficiently original. The selection and portrayal of the real property facts was not a matter of discretion, but was dictated by convention and strict industry standards. Or is the survey plat an original work involving subjective judgment and some creativity in demonstrating the nature of the real property?

III. WHO OWNS THE COPYRIGHT?

A. Is the survey a work for hire?

B. Is it a specially commissioned work?

Under the Copyright Act, 17 U.S.C. §201(a), the copyright in work vests initially in the author of the work. However, the Copyright Act also accords special treatment for works made for hire. In 17 U.S.C. §201(b), the employer or other person for whom the work was prepared is considered the author for copyright purposes. This has been extended to commissioned works or works prepared on special order or commission. Some such works are considered the equivalent of a work made for hire, and 17 U.S.C. §101 specifically enumerates the qualifying works. If a work does not fall within one of the qualifying categories, then even if it has been prepared by

one person upon the special order or commission of another, it will not qualify as a "work made for hire." *See Nimmer on Copyright*, §503(b)(2)(A) noting that architectural work is not within one of the categories. The categories do include "compilation," but without further definition.

Moreover, 17 U.S.C. §101 would still seem to require a written agreement by the parties that the work is to be considered a work made for hire. If such a written agreement must exist, rather than relying upon implication or common law, then the issue could more readily and easily be addressed as an assignment of copyright ownership in any event. However, it is certainly arguable that the creation of a survey plat is the result of a special order or commission by a consumer to the surveyor, and, in the presence of a written agreement by the parties, could readily be treated as a work made for hire.

C. <u>Is there an implied license permitting copying?</u>

As has been suggested by the Texas Society of Professional Surveyors, a buyer of a survey may have an implied, non-exclusive license to make further copies of a work for the transaction at hand. *See*, for example, *Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc.*, 128 F.3d 872 (5th Cir. 1997), and *I.A.E., Inc. v. Schaver*, 74 F.3d 768 (7th Cir. 1996). *See also* 17 U.S.C. § 202 ("Transfer of ownership of any material object, . . . does not of itself convey any rights in the copyrighted work embodied in the object.") The scope of this implied license will in turn be a factual inquiry pending, in large part, on the purpose for which the survey was requested. An easy argument can be made that the purchaser would be likely to be found to have an implied license to make copies of the surveys for the original transaction only. It is also probable that the scope of the license would not extend to providing copies of the survey to any third party for any purpose. However, a more difficult area is the purchaser's right to reuse the survey, and make additional copies in connection with that use, for subsequent transactions. The Texas Society of Professional Surveyors has expressed the belief that the purchaser would not have that right. A consumer/borrower, in a typical transaction, would likely express the belief

that he was purchasing the survey plat for his own use in connection with the property, which would include copies for subsequent transactions. In any event, this is a factual inquiry and the danger of not having a written agreement.

IV. HOW CAN THE SURVEY PLAT BE USED?

A. Is there any limitation on the consumer's use?

See 17 U.S.C. § 109 and *Nimmer on Copyright (2002),* § 8.12. Once the copyright owner first sells a copy of the work, his right to control its further distribution is exhausted. This is the "first sale" doctrine. The copyright owner loses the right to control distribution and usage of that item, but he does not lose the right to control reproduction. *See Design Options, Inc. v. Bellepointe, Inc.*, 940 F. Supp. 86 (S.D.N.Y 1996). Thus, the consumer can reuse the purchased plat, but may be limited in his ability to make copies.

V. WHAT IS AFFECTED?

A. Procedural Rule 2-b.

Procedural Rule 2-b is attached as Appendix A, along with the Residential Real Property Affidavit T-47. P-2b clearly requires a title company to use a qualifying affidavit and prior survey in connection with a residential real property refinance under qualified conditions. In fact, notice is required to be given to the borrower of his right to do so. As noted in the rule, the following requirements exist: (1) the borrower must provide an original legible copy of a prior survey utilized in connection with an insured transaction in which the borrower acquired title or previously borrowed money against the property; (2) the borrower must have actual knowledge of the physical condition of the property since the date of the prior survey; (3) the same land is involved; and (4) the affidavit as to no change is provided. The affidavit essentially identifies that there have been no improvements or encumbrances.

P-2a also permits the company to accept an existing real property survey. This is a permissive procedural rule but most title insurance companies have taken steps to accept prior

surveys accompanied by the appropriate affidavit (notwithstanding the age of the survey or the identity of the person for whom the survey was prepared). This, in turn, has led in substantial part to the copyright controversy.

B. TREC Forms

However, the title industry is not the only party to the real estate transactions being affected. The standard TREC form for 1-4 family residential contract sales includes in paragraph 6.C. Survey:

> (3) Within ___ days after the effective date of this contract, seller shall furnish seller's existing survey of the property to buyer and the title company, along with seller's affidavit acceptable to the title company for approval of the survey."

See Appendix B. The Texas Real Estate Commission form for a Farm and Ranch Contract has a similar provision.

C. Lender Underwriting Guidelines

Each lender, depending upon the agency by which it is governed, is also required to establish real estate lending standards and guidelines. For an example, 12 C.F.R. 34 addresses the requirement of the Comptroller of the Currency, Department of the Treasury. In Section 34.62, each national bank is required to adopt and maintain written policies including prudent underwriting standards. Thus, to some extent the underwriting standards are left to each lender, but it is required to establish standards and requirements for review of the real estate collateral. At present, most lenders accept prior surveys on residential transactions. These guidelines in turn could be affected by copyright issues in connection with the surveys.

D. Texas Society of Professional Surveyors

The Texas Society of Professional Surveyors has obtained an opinion from Eric B. Meyertons dated July 10, 2001. It is available at the TSPS website and has also been provided as a part of Mr. Mark Hannah's companion presentation. Attached as Appendix C is a summary of

the opinion published in *The Texas Surveyor*, September 2002. In essence, it is the position of the Texas Society of Professional Surveyors that a survey is copyrightable, with the copyright belonging to the surveyor. A purchaser has an implied license to make copies of the survey for the original transaction only, and may not make copies for subsequent transactions. As already noted, the surveying industry is obviously affected by the reuse of surveys for subsequent transactions. Legally, it would appear that they have little legal ability to restrict the use of the original sold survey plat, but it is the question of copies which is being contested. Obviously, this issue is an important one to that industry and will need to be resolved.

VI. SOME SUGGESTIONS

A. Get Lots of Copies

B. Get a New Survey

C. Obtain Ownership of the Survey Copyright

D. Obtain a License to Copy and Reuse

VII. MORE QUESTIONS:

1. What's to keep a second surveyor from "creating" a new survey from the prior survey – at a reduced price?

2. Should escrow agents completely step out of the retention of surveyors? Provide a list? Leave it to the borrower to provide a survey? Negotiate his own agreement? How many copies are needed?

3. Could a "survey" become a type of intangible property and property right which is appurtenant to the real property and transfers with ownership of the real property: i.e., Couldn't the title company and lender each review the survey and return it to the borrowers?

4. If the test of survey copyrightability depends largely on the fact question of originality and creativity, will not that be an initial threshold inquiry in every alleged copyright infringement? Will not this issue be a case by case evaluation? See *County Court of*

Suffolk, New York v. First American Real Estate Solutions, 261 F.3d 179 (2d Cir. 2001) (originality of tax maps was a fact question).

5. Similarly, will not the question of merger be a fact question in every contested survey copyright case?

6. Is a survey which originates from a title commitment a derivative work?

7. Does a copyright prohibit a subsequent surveyor from utilizing a prior survey plat? If so, how does the surveyor comport with the legal directive to retrace the steps of the original surveyor?

8. Could one challenge originality when a surveyor utilizes prior work?

VIII. A PROPOSAL

A cooperative approach to the issue to achieve some standardization makes sense – if antitrust and unfair competition concerns can be addressed. Obviously reuse and copying of surveys makes, at least, initial sense in that closing costs are reduced and the closing can proceed more quickly. Other than quicker service, the title company is a neutral so long as a good survey and affidavit is provided, nor does the realtor have significant concerns. The lender is interested in evaluating and protecting its collateral, but is also interested in reducing third party costs incurred in connection with a closing. The surveyor obviously suffers a loss of work and revenue.

However, there is also an underlying legal issue, generally in that a surveyor's liability is limited to the customer to whom it provided the survey. (*See Cook Consultants v. Larson*, 700 S.W.2d 231 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). This may be increased by an expanded certificate or arguments of foreseeability. Thus, third parties rarely stand in a position to seek recovery from a surveyor for a surveyor's negligence. This would argue strongly against using a survey provided to another or even upon sale of the property.

This also suggests reuse of a survey for a refinance would not diminish the surveyor's responsibility. A cynic might suggest surveyors rarely step forward to accept responsibility or even have the capacity, via insurance or otherwise, to accept responsibility. Improvement in this regard might make a survey more valuable and meaningful to a transaction. In particular, a current certification with meaning could bring real value to a closing.

Accordingly, a compromise might be to recognize the surveyor's copyright and utilize a standard written agreement to permit reuse and copying of a survey for the original transaction, refinance, and a subsequent sale, but not more. This would be consistent with the surveyor's liability, but the surveyor industry would need to step forward to provide better assurance for its responsibility.

IX. CONCLUSION

Accordingly, there are many questions addressing the use of surveys in the face of copyright claims. This discussion has identified some of those, but there are clearly others, including, in particular, the question of damages in the event there is an infringement. Damages could be sufficiently *de minimus* to make it impractical for a surveyor to seek to enforce any survey copyrights, especially in the face of significant legal issues which exist. However, as noted, each of the surveyor, title and lender industries are dependent upon the other, as is the consumer/borrower in need of inexpensive, but accurate surveys. With closing costs under pressure from Congress, the survey is an obvious and identifiable cost that can be reduced or eliminated, and thus the pressure to reuse prior surveys where there have been no changes. Perhaps in the end a compromise effort is warranted, benefiting all of the affected parties and avoiding the risk of litigation, and even more so, the risk of a legislative solution. This issue of copyrightability of survey plats should not be construed as demeaning the surveyor’s efforts in preparing their surveys, but the copyright laws may also be an inappropriate avenue to rewarding the surveyor’s efforts. As the Supreme Court noted in *Baker v. Selden,* 101 U.S. 99 (1880):

“Great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, but the law does not contemplate their being rewarded in this way.”