

# COPYRIGHT NOTICES ON SURVEY PLATS

By John M. Logsdon, PLS

Twenty years ago, an opinion article appeared in a journal of a professional society suggesting that land surveyors in North Carolina should include copyright notices on their plats. The author stated that the use of a copyright notice on plats would assure the surveyor was paid for the work performed in deed research, field work and plat preparation, and would protect the surveyor's economic interest by providing the surveyor an opportunity to charge for copies of the map and assuring additional compensation for subsequent use of the map. The article further noted that a surveyor's liability remains if the plat is copied and used by someone other than the original client. In the years since the publication of the article, the use of copyright notices on plats has become increasingly common.

The use of copyright notices also implicates the statutes and regulations governing surveying in North Carolina, and in particular the surveyor's certification on plats. In response to these concerns, the Board recently engaged the services of a law firm specializing in intellectual property law to gain a better understanding of the scope and extent of the copyright laws. The Board's primary obligation is the protection of the health, safety and welfare of the public, but this must be balanced with the right of surveyors to the protection of creative works provided by the Copyright Act.

## A. Copyright Law

The purpose of this article is not to provide legal advice to surveyors with regard to the Copyright Act; each surveyor must rely on his or her own understanding of that law as applied to specific facts, hopefully guided by competent legal advice. However, some general comments on copyright law may be of assistance in allowing the reader to understand the Board's position with respect to copyright notices on survey plats.

Article I, Section 8 of the United States Constitution gives Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Thus, the purpose of a copyright is to promote knowledge and, to encourage that purpose, the author is granted a monopoly for a limited time. The Copyright Act provides that copyright protection includes "original works of authorship, fixed in any tangible medium of expression." However, "the copyright in a compilation or derivative work

extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work." Interpreting the Constitutional requirements for copyright protections, the Supreme Court stated:

*The originality requirement is constitutionally mandated for all works. . . . No one may claim originality as to facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . . [Facts] may not be copyrighted and are part of the public domain available to every person.*

The Supreme Court went on to expressly reject the "sweat of the brow" doctrine that some lower courts had used to justify extending copyright protection to factual compilations: "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and Useful Arts.'"

In a recent case, a Federal appellate court applied these principles to a plat of survey that included both existing conditions and a proposed site plan. The court held that the existing physical conditions, including shape and dimensions, contours, and location of existing elements were facts not protected by copyright. However, a plat may be subject to copyright in two respects: (1) where the surveyor exercises originality in setting forth the details of presentation of unprotected information, and (2) where the plat depicts proposed improvements in a sufficiently specific manner, such as a site plat showing the location and footprint of a new building, the location and contours of parking lots, curbs, driveways, utilities, landscape design, and the provision of sediment and erosion controls.

As to those elements on a survey plat that are original and protected, the Copyright Act grants the copyright owner the following rights: (a) to reproduce the copyrighted work, (b) to prepare derivative works based on the copyrighted work, (c) to distribute the copyrighted work to the public for sale or other transfer of ownership, and (d) to display the work publicly. However, to the extent a plat includes elements not protected (e.g., existing physical conditions, or measurements between objects),

these exclusive rights do not apply. The remedies available to a copyright holder for infringement of protected rights include injunctive relief, impoundment of infringing copies, and recovery of monetary damages and lost profits.

Copyright rights arise as a matter of law upon the creation of an original work that falls within the provisions of the Copyright Act and that work is fixed in a tangible form. There is no longer a requirement that a notice of copyright be placed on the plat for the copyright protections to attach. However, if a copyright notice is placed on the plat, it should include a proper indication of copyright (©, Copyright, or Copr.), the date the plat was created or first published, and the identity of the copyright owner. This notice may assist the copyright owner in enforcing his or her rights. Furthermore, the recording of a plat with a Register of Deeds does not diminish the surveyor's copyright rights or ability to assert those rights.

A surveyor's professional liability arising out of the performance of a survey, based on the accuracy of the survey or other legal standards, is wholly separate from the surveyor's rights under copyright law. The surveyor's copyright rights cannot be used as a shield against professional liability arising out of a survey or plat. It is not a defense to liability that the person suffering damage relied on a copy of a plat obtained in violation of copyright law. The issue of the extent of a surveyor's professional liability to others than the surveyor's direct client was recently addressed by the North Carolina Court of Appeals and are beyond the scope of this article.

## B. Clients' Rights to Use a Survey Plat

Generally, the ownership of a copyright is vested in the author of the work: the surveyor who prepared the plat or the employer of the surveyor if in the course and scope of that employment. It is unclear from established law if plats are a category of copyrightable works that can qualify as contractual "works for hire" vesting the copyright rights in the plat in the client through a written agreement between the surveyor and client. If the surveyor and client intend for the client to own those rights, any written contract to that effect should also include an agreement that if not deemed a "work for hire," the copyright rights will be and are assigned to the client once the plat is fixed in tangible form.

In a case where there is no written agreement between the surveyor and the client regarding ownership of the copyright or limiting the

use of a survey plat, a client is considered to have a nonexclusive implied license to use the plat for the purposes intended. The implied license arises when (1) the client requests the survey, (2) the surveyor performs the work requested and delivers the plat to the client, and (3) the surveyor intends that the plat be distributed to fulfill the purposes for which the client requested the survey. This intent to distribute can be inferred from the parties' conduct, prior course of dealing between the client and surveyor, and industry custom.

Clients typically expect to be able to use the plat: they paid for a survey in order to accomplish a particular purpose. This may include: the purchase or sale of property; the development of a tract of land; or the resolution of a dispute with a neighbor. Likewise, the surveyor is typically aware of the purpose for which the survey is obtained. In a purchase or sale, the surveyor knows that the plat likely will be provided to the other party to the transaction, real estate agents, the client's attorney, a title insurance company and a lender. In the development of a tract, the surveyor can expect the map to be provided to engineers, contractors, lenders, attorneys and title companies. In a land dispute, the surveyor reasonably should anticipate that the plat will be provided to the adjoining owners and attorneys and may be used to erect a fence or as an exhibit in court. All are examples of intended uses of the plat, and the client likely has an implied license to use and make copies of the plat for those purposes.

## C. The Intersection of a Copyright Notice with the Board Rules

The following is representative of copyright notices that the Survey Committee of the Board has seen in recent years:

***Copyright ©, ABC Surveying, LLC. All rights reserved. Reproduction or use of the contents of this document, in whole or in part, without written consent of the land surveyor, is prohibited. Only copies from the original of this document, marked with an original signature and embossed seal of the surveyor, shall be considered valid, true copies.***

Surveyors have a constitutional right to protect their original works of authorship through the Federal Copyright Act. Those rights are unquestioned. In addition, though, the North Carolina legislature adopted Chapter 89C with the specific intent to "safeguard life, health and property, and to promote the public welfare," and to that end, the Board has adopted

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rules that govern the practice of engineering and surveying. These rights and limitations must be viewed in conjunction with copyright law when applied to any particular situation.

The Board Rules appear in Title 21, Chapter 56 of the North Carolina Administrative Code, and include the following:

- A licensee must be objective and truthful and include all relevant and pertinent information in all professional reports, statements or testimony. 21 NCAC 56.701(d)(1).
- All drawings, maps, specifications, reports and other documents representing the final work of a licensee must be certified by the licensee, by signing and sealing in accordance with 21 NCAC 56.1103.
- The results of a survey must be reported to the user of the survey, whether in written or graphic form, in a clear and factual manner. 21 NCAC 56.1602(f).

The Board believes the sample copyright notice conflicts with these Board Rules. In particular:

1. The notice purports to restrict the “use” of the survey plat. As noted above, the client has a reasonable expectation to be able to use the results of the survey – that is why the client obtained and paid for the survey. In the absence of a written agreement, the client has an implied license to use the plat for its intended purposes. Certainly, the surveyor can limit those uses through the use of a written agreement negotiated with the client and signed by both parties. The surveyor cannot circumvent the obligations to be objective and truthful and to include all relevant and pertinent information by unilaterally inserting a restrictive copyright notice. In the absence of a written agreement with the client to limit the uses to which the plat may be put, the sample notice may violate Rule 56.701(d)(1).
2. The notice purports to restrict the use of the “contents” of the survey plat. The Copyright Act makes it clear that the factual information appearing on a plat is not subject to copyright protection. Therefore, the depiction of existing conditions (including the boundary lines, bearings and distances, description of the monuments, and distances of improvements from the boundary) are not subject to copyright protection. The factual information on the plat “may not be copyrighted and are part of the public domain available to every person” in the words of the Supreme Court. Consequently, the purported

restriction on the “contents” of the plat is not truthful and/or does not include all pertinent information. Without making clear that the only “contents” that are protected consist of original works of authorship, this statement violates Rule 56.701(d)(1). In addition, including the words “in whole or in part” implies that no portion of the contents can be used, which is clearly at odds with copyright law that expressly does not protect factual information. The use of “contents” in the sample notice is not clear and factual and its inclusion on the plat may violate Rule 56.1602(f).

3. The notice purports to prohibit “reproduction” of the plat. The right to reproduce works of original authorship is a right protected by copyright. Again, however, absent a written agreement to the contrary, the client has an implied license to use the plat for its intended purpose. Depending on the situation, this could include emailing a copy of the map to the client’s attorney or copying the map for a prospective purchaser or lender.
4. The last sentence of the sample notice appears to confuse copyright protections with a licensee’s certification obligations. Rule 56.1103 requires the plat or final written report of survey to be certified by the signature and seal of the surveyor at the time the plat or report is issued. Once that is done, the plat or report is certified. Making copies of the signed and sealed map does not invalidate the certification. The inclusion of the statement that “only copies from the original of this document, marked with an original signature and embossed seal of the surveyor, shall be considered valid, true copies” makes it appear that another copy of the plat is not certified. Regardless of whether a particular copy includes the original signature or embossed seal, the plat was certified when it was originally issued, and all obligations of the surveyor with regard to the work attached at that time. The inclusion of this statement is confusing, may be inaccurate, and may violate Rule 56.701, Rule 56.1602 and Rule 56.1103.

The Survey Committee of the Board has received comments from licensees expressing concerns over the alteration of plats after the surveyor issued the plat. Modern technology has made alterations to plats nearly undetectable to the untrained eye. To protect against that possibility, these surveyors have included statements on plats similar to the last sentence of the sample copyright notice. The Board recognizes and appreciates this concern, but the surveyor must avoid confusion between certifying the final plat or report and providing assurance that a copy of the certified plat or report has not been altered. To be clear: the Board will not



hold a licensee responsible for unauthorized alterations made to a plat or report after it leaves the control of the licensee. To protect the public from unauthorized alterations, a surveyor may include a statement that copies of the original plat or report that have been made and distributed by the surveyor will include an original signature and/or an embossed (or colored) seal.

#### D. Summary

Surveyors have a constitutional and statutory right to assert copyright protections for their original works of authorship, but such rights do not extend to the factual information contained on a plat. Absent a written agreement to the contrary, a client has an implied license to use the results of a survey, including the plat, for its intended purposes. To avoid any confusion between a surveyor and client, if the surveyor wishes to better define or restrict the client's right to use the survey plat, the surveyor should negotiate a written agreement specifying the uses to which the plat may be put. As noted above, an expansive copyright notice may violate Board Rules. To reduce the possibility that a plat has been altered after leaving the surveyor's control, a surveyor may include a statement on a plat to clarify that copies of the plat that have been distributed by the surveyor will include an original signature and/or embossed or colored seal.

While other forms may also be satisfactory, the following is an example of a notice in compliance with the Board Rules:

**© 2021, ABC Surveying, LLC. All rights reserved. Copies of the original of this document distributed by the surveyor bear the original signature and embossed seal of the surveyor.**

*The author acknowledges the invaluable assistance of Arlene Hanks, J.D., and Moore & Van Allen, PLLC, in his preparation of this article.*

<sup>1</sup> Title 17, United States Code

<sup>2</sup> 17 U.S.C. § 102(a).

<sup>3</sup> 17 U.S.C. § 103(b).

<sup>4</sup> Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 347-48 (1991).

<sup>5</sup> Id. at 349, quoting U.S. Const. Art. I, § 8.

<sup>6</sup> Sparaco v. Lawler, Hatusky, Skelly, Engineers, LLP, 303 F3d 460 (2<sup>nd</sup> Cir., 2002).

<sup>7</sup> 17 U.S.C. § 106.

<sup>8</sup> 17 U.S.C. §§ 502-504.

<sup>9</sup> A notice is no longer required for works created after 1989. See 17 U.S.C. § 401.

<sup>10</sup> See Lamb v. Styles 824 S.E.2d 170 (N.C. App., 2019).

## CPC Update

Given the ongoing COVID-19 pandemic, and the lack of current in-person educational opportunities, we realize many licensees who may not have previously used online educational offerings may now be looking to take advantage of these online offerings to fulfill their continuing professional competency (CPC) requirements. Many professional associations and societies, private continuing education providers, universities and community colleges have long provided educational content online, which has been acceptable for CPC credit subject to the Board Rules. Below are some of the relevant Board Rules related to online educational content.

Board Rule [21 NCAC 56.1705\(d\)](#) allows Credit for correspondence, televised, Internet, videotaped, audiotaped, and other courses or tutorials, provided an exam is required for completion, shall be based upon one PDH unit for each hour assigned to the course, provided such hours are a reasonably estimated time for an average professional to complete the course.

Further, Board Rule [21 NCAC 56.1706\(2\)](#), requires the licensee to have attendance verification records in the form of completion certificates, or other documents supporting evidence of attendance, which can include a combination of registration confirmation, invoice, image capture of screen, or notes to show that the licensee "attended" the "presentation." Ultimately, the licensee attests to the Board on the renewal form and the maintained CPC log that the reported hours were obtained.

Per Board Rule [21 NCAC 56.1703\(3\)](#) **No exam is required for attendance at a webinar presentation if attendance is documented** as addressed above.

Additionally, your Board's CPC Committee recently met and agreed that webinars previously recorded did not require an exam in order to earn credit for PDHs, so long as attendance is documented as addressed above.

Our web site has a [Continuing Education page](#), which addresses many CPC related [frequently asked questions](#). If you can't find the answer on the web site or still have questions about obtaining your Professional Development Hours online, please contact Martha Michalowski ([mmichalowski@ncbels.org](mailto:mmichalowski@ncbels.org)).