

Copyright, Moral Rights & Architects

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PURPOSE

PWGSC is currently preparing a new Intellectual Property clause for standard Architectural & Engineering consultant agreements. This new clause is hoped to better reflect the business and operational needs of the Department, specifically, frequent requirements to make changes to existing federal buildings. The question of authors' and, in particular, of architects' moral rights has come up as a very important and sensitive aspect of the clause. The Department has a legal right to require a waiver of A&E consultants' moral rights. However, the PWGSC objective is to be able to run its operations smoothly all the while balancing the rights of the two parties of A&E contracts. In order to accomplish this, it has become apparent that a detailed analysis of the necessity for the waiver, as well as of the degree to which moral rights of architects are protected in various legislations, is required.

Although the main objective of this study is to analyze the moral rights of architects, this paper will also describe authors' rights in a larger context, including some background and historical development of copyright and moral rights in various jurisdictions. It is hoped that this analysis will help PWGSC in finalizing its decisions concerning the new Intellectual Property clauses for A&E contractual documents.

BACKGROUND

Copyright in Canada

According to the Copyright Act of Canada, the general principle of copyright law is that the author of a created work is the first owner of the copyright in that work. The Act also recognizes and protects moral rights, which belong solely to the author of the work and exist independently of copyright.

Intellectual Property under Canadian Law

The concept of Intellectual Property encompasses four principle legal areas: patents, copyright, trademarks and trade secrets. Intellectual Property refers to the rights of designers, inventors, authors, and producers to their ideas, inventions, expressions of ideas, works of authorship, as well as the identification of sources of products and services. In Canada, Intellectual Property, as a whole, does not have a legal framework. Artistic works, including architectural works, can only be protected under the Copyright Act. Despite the title, Canadian Copyright Act covers both the rights to copy and authors' moral rights related to work they created. It is interesting to note that French-Canadian translation of "copyright" is "droit d'auteur", or "author's right", which seems to be more in line

with the dual protection of authors in the Canadian Copyright Act. Yet, the English equivalent of “droit d’auteur” has not been adopted in Canada.

Treasury Board Copyright Policy

In 1954, the Treasury Board passed a decision stating the principle that the government should own what it has paid for, including intellectual property (Dep.of Justice, Legal Awareness Program, p.55).

In 1991, the Treasury Board reversed its 1954 decision and issued a policy entitled “Title to Intellectual Property Arising Under Crown Procurement Contracts”. Briefly, it states that Intellectual Property is best commercialized by the private sector and that ownership by the private sector is generally necessary to facilitate that commercialization. Therefore, intellectual property rights are to vest in the contractor, not the Crown. The policy was intended to apply to “Research and Development” contracts.

The 1991 Policy was influenced by:

- the 1988 amendment to the Canadian Copyright Act, strengthening protection of moral rights of authors,
- the US adherence to the Bern Convention in 1989,
- the advent of technology,
- and in response to pressure to follow examples of other governments, that is, having the private sector create jobs by exploiting innovations arising from government contracts.

In 2000, the Treasury Board revised its 1991 Policy, making it more difficult for the Crown to own copyright. All other terms of the new Policy remain essentially the same as in the original Policy (1991).

PWGSC has drafted Model Clauses for Intellectual Property to assist federal departments in revising their contract terms and to ensure consistency with the Treasury Board Policy. The SOSB Policy Notification (PN-49) states that the revised contractual Clauses, reflecting the Policy, would reduce “reluctance on the part of clients to allow the contractor to own the Intellectual Property, based on concern for their operations”. This statement may lead one to understand that the PWGSC contractor’s ownership of copyright could become a contentious issue, which has rarely, if ever, been the case with A&E contracts.

Copyright / Intellectual Property Clauses in PWGSC Agreements with A&E Consultants

In about 1989, a few years before the Treasury Board’s Intellectual Property Policy was first issued, PWC introduced a clause into the existing Agreements with A&E Consultants stating that “copyright in all documents, instrument to the Service, shall belong to the Consultant” and that the Crown may reuse the documents for another project by paying the consultant a fee. This clause is in line with the current Treasury Board Policy and there was no indication that it had caused any problem to either party of the Agreement. A decision was made, nevertheless, to propose a new, very elaborate clause on Intellectual Property to be part of standard RFPs for A&E Services.

Among other changes, within the proposed clause, the term “Copyright” has been replaced by “Rights to Intellectual Property”, even though the concept of Intellectual Property, as mentioned above, is not reflected in the Canadian legislation. Additionally, this new clause requires that A&E Consultants permanently waive their moral rights.

COPYRIGHT AND MORAL RIGHTS

Moral rights differ from copyright. Whereas copyright protects property rights, which entitles authors to economically benefit from the reproduction of their work, moral rights safeguard personal and reputation rights, which permits authors to defend both the integrity of their work and the use of their names. Many European countries provide for moral rights in addition to copyright held by an author. While copyright may be bought, sold or licensed, authors generally retain their moral rights, which cannot be transferred to third parties. The author and his/her heirs (in most countries) are the only ones who can be holders of the moral rights originally bestowed to the author. In the United Kingdom, Ireland, Holland, United States and Canada the author can, under certain conditions, waive his/her moral rights.

International Legal Framework for Authors' Rights

The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works, adopted on September 9, 1886, forms a legal framework for international law on authors' rights and copyright. Today, most countries are Member States of the Convention and have legislation recognizing the authors' right to authorize or prohibit the use of their work and to define the extent of its use in accordance with the Convention. Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia and United Kingdom became the first parties to the Convention in 1887. Other countries, such as Japan, Norway, Denmark, Sweden, The Netherlands, Portugal, Poland, Austria, and Greece subsequently joined the Convention in following years. Canada adopted the Convention in 1928 and the USA only in 1989. By April 15, 2002, 147 countries were party to the Berne Convention.

Under the Berne copyright convention, every creative work is copyrighted the moment it attains tangible form. In contrast, facts and ideas, not being tangible expressions of creative effort, cannot be copyrighted. In addition, Article 6 bis of the Convention (1979 amendment) requires countries to provide protection of the moral rights of paternity and integrity:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The Universal Declaration of Human Rights

Article 27, paragraph 2, of the Universal Declaration of Human Rights stipulates:
Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Despite the universal character of the Declaration and the existence of Article 6 bis of the Berne Convention, the scope and the level of protection of an author's moral rights vary considerably from one country to another. As I have outlined in more detail below, it is particularly strong in France and virtually non-existent for most authors in the United States

Historical development of moral rights in copyright legislations

The modern concept of copyright originated in 1710 with the British Statute of Anne. (“*Statute of Anne act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies*”). While governments had previously granted monopoly rights to publishers to sell printed works, this Statute first recognized that authors, rather than publishers, should be the primary beneficiaries of such laws, and it included protections for consumers of printed work, ensuring that publishers could not control their use after sale. It also limited the duration of such exclusive rights to 28 years, after which all works would pass into the public domain.

The *Statute of Anne* marked the formal beginning of Anglo-Saxon copyright law. The Statute is generally regarded as the world’s first act to deal with authors’ rights to their work, even though those rights were initially limited to benefits from copying the books they wrote. In reality, rights given to authors are likely to have been only a secondary result of the official noble purpose of the law, namely “*the encouragement of learning*”, or of one somewhat less noble, that is the attempt to control printed material in the post-Gutenberg Europe. It is important to realize that the laws directly derived from this concept are not concerned with the personal interests of authors; they have not protected authors from falsification of their work and have not given them authorship rights. Their primary role was to protect the copy. Although personal rights are not altogether neglected in the British copyright tradition, Copyright has traditionally been a privilege conferred for the public good.

All Common Law copyright legislations refer to copyright as to a property with economic benefits resulting from it. In the Anglo-Saxon tradition, a work of creation is, in essence, a commodity.

While Anglo-Saxon legislations today provide copyright protection, authors in most European countries are granted authors’ rights, safeguarding them from both copyright and moral rights infringements. For example, in contrast to the British system, copyright systems adopted in continental Europe and Japan focus more on the right of an author rather than on the economic value of the work itself. These rights, granted in the context of a different, more person-centred tradition, have their origins in French law. One of the outcomes of the French revolution was a framework of legislation in which the author, a real person, has intellectual rights to his or her works and in consequence is sovereign in deciding their expression, disposition and distribution. Under this law authors further have moral rights to protect their good names and reputations. The fact that these attributes are integral to the act of creation justifies the moral rights of authors as being perpetual and inalienable.

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Copyright /Author’s Rights and Moral Rights legislations in different countries

With the exception of the UK and Ireland, all European Union member states, as well as most countries outside of the Union, have *authors’ rights* legislation, as distinguished from *copyright* laws.

France

France is widely acknowledged to be the country with the most comprehensive code for moral rights. The Intellectual Property Code (formally, the Copyright Act of 11 March 1957) is a legal framework for protection of authors’ rights (“*droit d’auteur*”) in France today. The Code recognizes four categories of moral rights: the rights of disclosure, withdrawal, attribution and integrity. In the French Code, moral rights exist in conjunction with property

rights - the two types of rights are not clearly separated under the law, but instead are embodied in a single statute. Authors' personal rights ("*droit moral*") are central and inalienable, in that they cannot be transferred or waived, perpetual, and, from some points of view, such as civil and penal sanctions, superior to pecuniary rights. In practice, the exercise of one's moral rights is subject to a test of reasonableness. For example, in spite of the French law granting authors an almost absolute right of integrity, an author, in making a contract, gives permission to make modifications inherent to the mode of exploitation of his work.

The moral rights of authors only apply to completed work, which, in the case of architecture, means a finished structure. Because the Code is seen by some to be lacking in the area of protecting the creative process, in addition to its completed form, such as a building, there is currently a strong push within the architectural milieu to recognize and apply moral rights also to design.

The Netherlands

Dutch law recognizes personal rights of authors. This country is the only continental European Union member where an author may contract to waive the rights to be mentioned by name and restrain modification of his work. Authors may not, however, waive the right to object distortion, mutilation or other modifications of the work prejudicial to their honour, reputation or value.

Germany

The development of German Copyright Law was greatly influenced by the Berne Convention and by the international development of the concept of moral rights. Unlike those of many other countries, German law gives copyright protection to employees who create a work in the course of their job. Moral rights are listed in a separate section of the German copyright legislation.

United Kingdom

Prior to 1988, the only recognized moral right in the United Kingdom Copyright Designs and Patents Act was covered under false attribution provisions. The 1988 UK Act provides generally for the right of attribution and the right to integrity. The right to be identified as the author of a work applies also to architects. There are some exceptions and limitations regarding the right of attribution and integrity. For example, the right to integrity is expressed as the author's right not to have his work subjected to derogatory treatment.

However, even authors whose work is clearly protected by moral rights have to claim these rights in writing and are sometimes pressured into waiving them in full. A waiver may relate to specific or general work and may relate to existing or future work. It may be subject to revocation.

Under the UK law, authors have no moral rights in works created in the course of employment or in work subject to Crown copyright.

Because of the numerous restrictions, and in particular because of the necessity for authors to overtly assert their moral rights, the UK copyright law has often been criticized for not fully meeting the requirements of the Berne Convention.

United States of America

The US resisted joining the Berne Convention for over 100 years, mainly because it needed to significantly revise its 1790 copyright law in order to harmonize it with the treaty. One of the primary concerns stalling this process was the moral right issue. The U.S. successively argued for years that their various national and state laws regarding copyright, label, defamation, misrepresentation and unfair competition satisfy the Berne's requirements. The US joining of the Berne Convention in 1989 revitalized the concept of moral rights within the visual art community. In 1990, the US Congress signed the Visual Artistic Rights Act (VARA), granting authors of visual works (only) limited rights of attribution and integrity. Alas, applied art (and architecture) are among the categories of visual works explicitly excluded from VARA protection.

Under the US law, moral rights of artists may be waived in writing.

Australia

The Copyright Amendment (Moral Rights) Act of 2000 amends the Australian Copyright Act of 1911 by providing two new “moral rights” for individual creators: the right of attribution of authorship and the right of integrity of authorship. In the Act, architecture, drawings and plans are mentioned under “artistic works”. The architect, as a creator, is entitled to take legal action for breach of moral rights. Moral rights apply only to individuals, not to firms, and are not transmissible except if the creator dies, or if his or her affairs are lawfully administrated by another. More than one creator may agree to exercise their right of integrity jointly. Architects are entitled to attribution as authors of work and must be identified according to their own specifications. They also have rights against false attribution of their work and can object if the names of their superiors are substituted for their own or added without contribution to the work. The Act also protects architects from having their work subjected to derogatory treatment (mutilating, distorting, altering it or doing anything that is prejudicial to the authors honour or reputation). However, if the treatment of the protected work is reasonable, no infringement will arise, even if such treatment would otherwise infringe the creator’s moral rights. This ensures that public institutions and museums are able to make needed changes to their buildings without infringing of authors’ moral rights. The Australian legislation prescribes a number of matters to be considered in determining reasonableness, including the nature of the work and its potential to change (such as a change in the course of performance, or a change in the client’s need), as well as the purpose, manner and context of its use and relevant industry practice. The Act lists *Special exceptions to infringement*, including “*changing, relocating, demolishing or destroying a building, provided certain conditions are met*”. These conditions include the giving of notice and provision of access to the building to its author. In addition, any restoration or preservation work done in good faith does not constitute an infringement of moral rights.

Japan

Japanese law includes a right of divagation, identification and of integrity. The author’s moral rights are exclusively personal to him and are inalienable.

Canada

The Canadian Copyright Act of 1924 was amended in 1988 to address a number of areas, including moral rights. Artistic works, including architecture, are protected against distortion, mutilation or modification. The Canadian Act features the concept of Paternity, defined as the author’s right to be associated with the work, and contains an explicit and strong statement on the author’s right of integrity. Under the Copyright Act, moral rights are not perpetual but are tied to the duration of the copyright and descend to the first direct beneficiary of the author’s estate. Personal rights cannot be assigned but can be waived. A waiver does not need to be in writing.

Architecture – A Battlefield of Moral Rights defenders

Disparity in how different countries’ legislations protect authors’ moral rights, including rights of architects, has become a favoured topic of debate amongst academics. This debate has soared in the last decade, in part because of the harmonization of European laws in the United Europe. It is, for example, widely acknowledged that the concept of moral rights has attained something akin to a “cult status” in French legislature. However, the fact that moral rights have often been regarded as sacred in France has prompted some skeptics to quip that “missionaries of moral rights” preach conversion to moral rights in countries reputed to be uneducated and heretical - the English speaking countries, where only copyright is known....

On the opposite side of the spectrum, the copyright system, especially the one adopted in the US, is called by its critics “a political conspiracy of publishers and media corporations”, who are in turn described as “capitalists who want to own whatever their enterprise produces...tangible or intangible.”.

The following excerpt from an article of Michel HUET, Docteur en Droit, Avocat à la Cour, Spécialiste du Droit d’Auteur et du Droit Immobilier in France, gives some flavor of the cultural, political and emotional debate on the differences between “le droit d’auteur” and the copyright system. A translation into English, or even French

Canadian where copyright = droit d'auteur, would probably not reflect the fervour of the language defending the concept of authors' rights versus that of copyright. The article also describes the essence of architectural creation in such an ardent way that it can be only sensed in its original form.

(...)

La création devient, aujourd'hui plus qu'hier, l'enjeu fondamental de notre société occidentale, soumise aux assauts du capitalisme financier et marchand qui tente de la réduire à un simple objet, à un simple produit d'échange et de consommation.

(...)

Le droit d'auteur est un droit de l'Homme, personnel, individualiste, attaché à l'originalité de la création.

Le droit du copyright est un droit économique attaché uniquement à l'exploitation d'un produit dont doit pouvoir bénéficier le concepteur pour gagner le maximum d'argent.

Quant à la protection de ces deux droits :

Le droit d'auteur, parce qu'il ne sépare pas l'œuvre de son auteur, parce que l'œuvre est le reflet de la personnalité de son auteur, protège et l'œuvre et la créateur qui en est le père.

C'est parce que la création est "essentielle" que cette protection est éternelle, incessible. On ne peut pas céder son être. C'est un droit moral.

Par contre, il peut exploiter ses droits durant soixante dix ans pour la reproduction ou la représentation (exposition) de ses œuvres : c'est un droit patrimonial.

Le droit du copyright, parce qu'il est un droit marchand, protège avant tout la marchandise, le produit, la prestation.

Il peut être acquis en totalité et son acquéreur peut en disposer comme il l'entend, le commercialiser, le transformer sans que le concepteur puisse intervenir puisque la notion de paternité n'existe pas.

(...)

Les instances européennes des Architectes ont participé activement à la bataille de SEATTLE et défendent âprement la Culture architecturale européenne face à l'impérialisme américain qui tente d'imposer sous couvert du libre échange, la logique des produits.

Peut-on se satisfaire de celle que nous ont légué les Révolutionnaires du siècle des Lumières, même si elle seule aujourd'hui, nous permet de gagner, en tous les cas sur le terrain de l'Architecture, quelques batailles.

Il faut refonder le Droit d'auteur mais sans rien abandonner aujourd'hui.

Cette refondation ne peut se faire qu'en regroupant et les auteurs, et les juristes qui n'ont pas vendu leur âme en croquant à belle dent le gâteau du Copyright.

(...)

Le droit d'auteur n'a pas pour objet de magnifier le génie créateur des auteurs inspirés par les Dieux et de rendre leurs œuvres intangibles. Jamais le Droit d'auteur n'a dit " ne touche pas à mon œuvre ". Le Droit d'auteur protège simplement l'auteur des abus de ceux qui la lui volent ou la lui défigurent. C'est grâce au Droit d'auteur que, sans contrat écrit, l'architecte peut faire condamner un promoteur indélicat qui ne l'a pas réglé de ses honoraires et s'approprié un projet d'architecture en le dénaturant.

C'est grâce au droit d'auteur que l'on peut défendre deux idées essentielles : on ne peut séparer l'œuvre de son auteur, on ne peut dissocier le temps de la conception et le temps de la réalisation.

(...)

Il faut vraiment refonder le droit d'auteur :

En faisant front, certes, pour déjà préserver ce qui peut encore l'être, mais surtout, en élaborant une réflexion avec un projet ayant un sens qui doit : privilégier la dimension historique pour mieux comprendre la naissance du droit d'auteur, mener un véritable combat idéologique aux côtés de tous ceux qui veulent repousser la barbarie et l'obscurantisme.

Le temps est venu de choisir son camp : celui des gens de l'Etre. Quant aux gens de l'Avoir, ils ont suffisamment de moyens et de droits. Qu'ils se les disputent entre eux, qu'ils fusionnent à tout va, qu'ils s'accrochent à leurs corbeilles, qu'ils s'amusent avec leurs produits marchands ou financiers, qu'ils soient créatifs pourquoï pas, mais créateurs, non !

On ne peut tout de même pas tout avoir, tout posséder.

Le Droit des Affaires est suffisamment développé pour offrir aux financiers et aux investisseurs des moyens suffisants pour faire " roter " leurs capitaux.

International/Common Law Institutions/Agreements and Moral Rights of Architects

International Union of Architects (UIA)

The only reference to Intellectual Property/Copyright within Union writing can be found under *Policy Issues*, which states "that the national law of a UIA member section should entitle an architect to practice his/her profession without detriment to his/her authority and responsibility, and to retain ownership of the intellectual property and copyright of his/her work"

World Trade Organization (WTO)

Except in dealing with trademarks, the WTO does not recognize moral rights, perhaps to satisfy the US, which incessantly protested the inclusion of the concept of moral rights in any international convention.

NAFTA

Excludes moral rights.

The American Architectural Foundation

No reference to authors' rights /copyright.

Oxford Intellectual Property Research Centre

No reference to architecture was found.

American Institute of Architects, Royal Institute of British Architects, Royal Institute of Irish Architects, Royal Architectural Institute of Canada (RAIC)

No statement / position on moral rights, and very little on copyright was found in the policies and missions of the above Institutes. (Standard Contracts were not reviewed). The RAIC, in chapter 1.1.1 of the Canadian Handbook of Practice for Architects, reminds architects that their rights are protected by law, and advises them to retain ownership of the copyright in all instances.

Royal Australian Institute of Architects (RAIA)

The RAIA takes a very strong stand on the question of moral rights for architects. The following two letters exemplify the Institute's official position on the issue, and illustrate both the importance of the subject of moral rights to architects, and the extent to which the RAIA goes to protect its members' rights.

Adding Value to Members Intellectual Property

*By RAIA CEO
Michael Peck AM LFRAlA*

March 2001

Members will recall that the Institute has for a number of years been lobbying the Federal Government in respect to bringing Australian Copyright Law in line with the provisions of the Berne Convention.

An important aspect of the amended legislation recently en-acted is the establishment of Moral Rights for creators.

*For architects this provides two significant rights of which members should
Be aware.*

In respect to the moral Right of Integrity it is now illegal for a building owner to demolish the creative work of an architect without:

firstly, if possible, identifying and notifying the architect and

secondly, affording the architect an opportunity to record the work before it is demolished or altered.

To those accustomed to the moral rights enjoyed in some Napoleonic Law countries this may not appear to be insufficient reform. However it is for Australian architects an important acknowledgment of their creative contribution.

In practical terms it also provides the original architect with the possibility of conveying to the current building owner, or architect, a better understanding of the original design intent and the possibilities inherent in the design for future modification and improvement, if that is the owners intent.

The new law also establishes the Moral Right of Attribution.

It has long been a fascination and irritation to architects to note that virtually without fail magazines, newspapers and journals acknowledge the artists responsible for the paintings and sculptures that are published, yet most often the architects of featured buildings are not mentioned. Now, however, under the new legislation it is illegal for the published work of an

architect not to be attributed to that architect.

The Institute has also played a part in two other significant wins for the profession on copyright which I have reported on elsewhere;

The recommendation from the Intellectual Property and Competition Review Committee to the Federal Government that the Crown no longer enjoy preferential treatment under the Copyright Act and the amendment to the Australian Standard AS4122 which now requires any Proprietor who wishes to have the copyright in an architects work to pay for it separately and in addition to the fee for architectural services.

So next time the question arises on what does the Institute achieve for its members - raising the value of architectural intellectual property is not a bad subject to start with.

Michael Peck AM LFRAIA

Submission to the Hon Peter McGuran:

3 December 1999

The Royal Australian Institute of Architects applauds the Government's intention to introduce legislation to protect the moral rights of creators. (Copyright Amendment (Moral Rights) Bill 1999).

However, the Institute is concerned that, as presently drafted, the legislation will be ineffective in protecting the moral rights of architects.

Cl.195AT specifically excludes the architect's moral right to integrity. This is inconsistent with Australia's obligation under Article 6 bis of the Berne Convention.

We understand this provision has been introduced as an expediency to avoid the need of clients of architects having to deal with architects inappropriately asserting moral rights of integrity in a building.

This provision unjustly discriminates against architects and subverts the intent of moral rights legislation.

The Institute submits that the provision in the Bill providing that there is "no infringement of right of integrity of authorship if derogatory treatment or other action was reasonable" is sufficient protection of the rights of building owners and consequently there is no need to specifically exclude the moral right of integrity of architects in their works.

Consent Provisions

In spite of the Government's assertion that the waiver has been dropped, the concept of waiver has, in fact, been maintained in the Bill through the introduction of 'comprehensive consent'.

The RAI A believes that the provision in the Bill (Cl.195AW) for it not to be an infringement of an author's moral rights where consent is given "related to a work or works of a particular description:

- (i) *the making of which had not begun at the time consent was given; or*
- (ii) *that was or were in the course of being made at the time the consent was given” will have the practical effect in the marketplace of making the legislation ineffective in respect to the moral rights of architects.*

Users of architectural services are generally economically much more powerful than architects and will use that power to subvert the intention of the legislation to protect the moral rights of creators.

Clients of architects will, as a matter of course, make it a condition of a commission that architects provide a consent not to exercise their moral rights. This type of unfair behaviour is already well established in respect to architects copyright, particularly in respect to works for the Crown. Where, in spite of the Government’s intentions, when the Copyright legislation was enacted, architects are continually required to accept that copyright will vest in the client agency.

Rights of Copyright Owner in Architecture

Basic legal rights of copyright owners include:

Reproducing the work

Publishing the work

Communicating of the work to the public

When is permission needed from the copyright owner of architectural plans? Permission is usually needed from the owner of copyright to reproduce a building plan. Permission is also usually needed to build a building that reproduces the plan (*Copyright and House Plans, Australian Copyright Council*).

Under many jurisdictions, including France, copyright applies only to tangible forms of creation, not to ideas. In the field of architecture, it means that buildings, not plans, can be protected. In those jurisdictions, an owner of a copyright in a building, normally an architect, will generally be able to take legal action under the Copyright Act against a person who copies that building. Similarly, in the case that copyright also applies to the design, an owner of the copyrighted architectural drawings, will generally be also able to take legal action against a person who infringes upon the copyright by using that design.

Cases of architects copying buildings of other architects are extremely rare, and professional codes in most countries strictly forbid such practices. An attempt to copy a building can possibly be made by a developer or an owner of the building using services of an unlicensed architect, but, contrary to other “products”, buildings cannot be easily repeated, mass-produced, or their design commercialized. By and large, architects do not therefore see unauthorized copying of their buildings as either a real issue or a viable economic opportunity. Rather, what raises architects’ concerns is related to the integrity of, and the association with, the work they create – in other words, to their moral rights.

Waiver of Moral Rights

Integrity and association with their projects, two important aspects of architects’ work, are probably the very reason for the imposition of the moral rights waiver. Owners who use the waiver clauses in their contracts aim

to prevent architects from exercising their rights to oppose significant changes to their projects, or from publicly defending themselves if their professional image is at stake.

In mainstream Civil Code authors' rights jurisdictions, the concept that moral rights can be waived verges on the nonsensical. "Under French law, what you create is part of your soul". (Kelman 1995). In France, moral rights are perpetual. They also cannot be waived in most European Union countries, except for the Netherlands. However, moral rights may be waived in any of the Common Law jurisdictions. In Australia, although the law does not explicitly mention the possibility of waiving moral rights, it allows for "comprehensive consent" which, in practice, maintains the concept of waiver.

Although some see the ability to waive an author's moral right as facilitating trade - for example, in the sale of subsidiary rights (the making of books into movies), others, such as Dworkin and Vaver, argue that standard waiver clauses are detrimental to creators, because they strip the authors of all bargaining power. Moreover, they claim that making moral rights waivable in practice eliminates them entirely.

The Berne Convention, unfortunately, is silent on the question on whether moral rights can be waived or alienated. It is for this reason some member countries allow the moral rights waiver without fear of being regarded as non-compliant signatories.

Personal comments

Considerable time and effort has gone into the preparation of the new Intellectual Property Clause for A&E contracts. The clause has taken the form of a four-page text which is complicated and full of legal terminology. It introduces a number of complex and little known to most architects concepts and definitions of: *Licence to Foreground*, *Licence to Foreground for Other Projects*, *Licence to Background*, *Canada's Right to Disclose and Sub-licence*, *Consultant's Right to Grand Licence*. This, unfortunately, may result in PWGSC consultants not clearly understanding the clause intent and consequences.

PWGSC definitely needs to be able to make minor changes to designs and buildings quickly and without infringing on contractual copyright provisions. The overwhelming majority of our consultants would not oppose minor changes to their designs, especially if these changes are dictated by operational needs and when architectural plans, in the first place, were created to satisfy requirements external to the architect's personal dimension. To cover the rather remote possibility of being challenged by consultants opposing any change to their design, PWGSC could consider adding a short paragraph to that effect to the existing copyright clause.

Of course, the situation would be quite different if the changes PWGSC wants to introduce to a project were more fundamental in nature. In this case, some sort of consultation with the author of the project would probably be advisable before implementing the contemplated modifications.

The distinction between a minor and a significant change to a project can be difficult. Perhaps, instead of having to debate which change is minor and which is significant, we should decide the criteria to be introduced into the list and scope of the modifications in order to avoid infringement of the integrity right. Some codification of the balance of interests of both parties of the contract would also be useful. In practice, when there is an issue of infringement of moral rights, the courts have usually proceeded to balance both parties' interests.

Interestingly enough, a situation where a consultant is working on some material originally prepared by somebody else may not necessarily constitute the infringement of:

1. moral rights of the first consultant, if the change or modification to the original design is minor;
2. copyright of the first consultant if the work of the subsequent consultant serves not to "reproduce" the original work; or if there is no economic gain from the original work to others (rather than to the creator of the original work).

No doubt, the concept of copyright is complicated, and it is unlikely that the many “grey zones” will ever be eliminated from the legislation. This, of course, implies that the various viewpoints will likely remain in conflict in the exercise of copyright and moral rights law. However, experience in many countries suggests that enforcement of moral rights through the courts is a rare occurrence. Fairness, reasonableness, balance of interests and existing industry practices are most often the basis for dealing with controversial moral rights issues. I am afraid that adding volume and further complexity to our clause may exacerbate the confusion that already boggles down the issue. Maybe the writer did not exaggerate much when he assessed the copyright situation as follows:

“Only one thing is impossible for God: to find any sense in any copyright law on the planet. Whenever a copyright is to be made or altered, then the idiots assemble.”

Samuel Clemens (Mark Twain), circa 1906

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