Ontario Association of Architects

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Recent Changes to the Copyright Act

Summary

The *Copyright Modernization Act* (the "Act") was proclaimed in force on November 7, 2012, and amended Canada's *Copyright Act*. Generally speaking, the Act attempts to update the rights and protection of copyright owners to better address the challenges and opportunities of the internet and increasing digitization of copyrighted material, while also expanding permitted uses of such material by users.

So what does the Act mean for architects? Put simply, as *prima facie* owners of copyright in their architectural works, architects can and will be affected by the Act's overhaul of Canadian copyright law, particularly with respect to:

(i) the protection of electronic documents through technological protection measures and rights management information; and

(ii) the rights of photographers in the photographs used or commissioned by architects for clients or their own advertising and marketing purposes.

Architectural practice must evolve to take advantage of the new creator protections in the Act.

Background

This Practice Tip contains a general summary of certain provisions of the Act and how they may impact architects. It is not – and should not be construed to be – legal advice. The Act contains exceptions and transitional provisions, and it is uncertain how courts will interpret the new provisions; indeed, much of the present legal debate is speculative. Accordingly, architects are advised to review the Act and its regulations (as well as relevant portions of the Architecture Canada/RAIC "Canadian Handbook of Practice for Architects" [CHOP]) and to seek the advice of their own legal counsel for any specific questions and in every set of circumstances that may arise that may impact their rights or obligations.

Technological Protection Measures (TPMs) and Rights Management Information (RMI)

Technological Protection Measures

1. Technological Protection Measures ("TPMs"), or "digital locks", are technologies, devices or components that control either access to or copyright of copyright-protected material (known respectively as "access control" or "copy control" TPMs). In the context of digital material, TPMs include dongles, registration keys, internet product activation, encryption, digital watermarks and passwords.
2. The Act prohibits the circumvention of "access control" TPMs with certain exceptions, regardless of the user's intention. A user who picks or hacks a digital lock or otherwise causes the circumvention of such a lock may be liable for copyright infringement. Moreover, users cannot offer circumvention services to the public; nor can they manufacture, import, distribute, sell, rent or provide devices, technologies or components whose primary purpose is circumvention. Users who illegally circumvent a TPM may face penalties ranging from damages to an injunction or penal/criminal sanctions.
3. The Act outlines various exceptions to the prohibition on circumventing a digital lock, e.g. use by persons with perceptual disabilities, and the government can enact regulations adding other exceptions.

Rights Management Information

1. Rights Management Information ("RMI") consists of information – such as digital watermarks –that is attached to or embodied in a work and identifies or permits the identification of the work or its author and may include the terms or conditions of the work's use. Ultimately, RMI enables owners to track and demonstrate illegal activity in respect of their protected work, while indicating to consumers that the work is authentic.
2. The Act provides that no person is permitted to knowingly alter or remove any RMI in electronic form without the consent of the copyright owner, if the person knows (or should have known) that the removal or alteration will facilitate or conceal any infringement of the owner's copyright or adversely affect the owner's right to remuneration under the Act. Persons who violate this prohibition – as well as those who subsequently deal with the work (e.g. by way of renting or selling it) who know (or should have known) that the RMI has been removed or altered in a way that would give rise to a remedy under the prohibition – may be subject to injunction, damages and other penalties under the Act.

Photographers' Rights

1. The Act aims to align the rights of photographers with those of other creators. Before the Act came into force on November 7, 2012, the owner of the photographic negative, plate or initial photograph was considered to be the author of the work, and as the author, was the first owner of copyright in such work. Additionally, if a photograph, engraving or portrait was ordered by some other person and was made for valuable consideration, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered (and paid for) was the first owner of the copyright. Practically speaking, this meant that persons who commissioned photographs owned the copyright in such photographs.
2. The Act repealed the above provisions, removing the distinction between photographers and other creators. The determination of authorship (and copyright ownership) with respect to photographs will therefore fall, as with other creators, to first principles of copyright, which generally hold that the author is the creator and copyright owner. Going forward, photographers will generally be the first owners of copyright in their photographs, regardless of whether the photographs were commissioned or not. As a result, the term of copyright in photographs was also aligned with those of other copyrighted works, to be life of the author plus 50 years.
3. With respect to photographs commissioned by a user for "personal purposes", the user has the right to private and non-commercial use of the photograph (or to permit such uses), unless the user and the photographer have agreed otherwise.
4. As a result of the foregoing amendments, photographic works commissioned before November 7, 2012 will be treated differently from those works commissioned **on or after** that date. Generally speaking, the commissioning party will own copyright in the former, while the photographer will own copyright in the latter (each subject to a written agreement stating otherwise).

Suggested Procedure / Practice Tips

Technological Protection Measures/Rights Management Information

1. Digital locks enable copyright holders to dictate how material may be used, including by architects' clients. Accordingly, architects should, to the extent possible, place a TPM on all copyrighted materials including drawings, specifications, PDF documents and other deliverables prepared for clients under architectural services contracts.

   Architects may also choose to incorporate RMI in order to track usage and any illegal activity in connection with the work.
2. The TPM should be consistent with the provisions of the applicable architectural services contract. For example, if the contract provides that copyright is owned by the client, then a TPM would not be appropriate. If, however, the architect is granting a limited license to the client in certain electronic deliverables, including a TPM in those deliverables may be appropriate.

The TPM or RMI should also be consistent with the other rights being granted to the client. For example, if the client is permitted to revise the electronic file, then the TPM should not prohibit the client from doing so, as the client would be forced to "pick the lock" illegally in order to do something it has otherwise been granted the right to do.

3. GC 8 of the OAA's "Standard Form of Contract for Architect's Services" (OAA 600-2013) provides (among other things) that all copyright in the architect's *Instruments of Service* belongs to the architect. *Instruments of Service* include non-editable *Electronic Documents* that comprise the design, drawings, specifications and reports prepared by or on behalf of the architect (or a consultant). If you are using this standard contract and are not amending GC 8 whatsoever, a TPM would be appropriate.

   If you are amending GC 8 of the standard contract, you should consult your legal counsel to determine the impact of the amendments on the appropriateness of a TPM or RMI.

   These comments also apply to the other standard forms of contract located on the OAA Website and made available to architects.

4. If a TPM is used, consider what type of TPM (i.e. access control or copy control or both) is appropriate.

Photographers' Rights

1. Architects must be concerned with:

   a) photographs **commissioned** by an architect **prior to** November 7, 2012, and

   b) photographs **commissioned** by an architect **on or after** November 7, 2012.

   Photographs taken by an architect or an employee of the architect for the architect's own business purposes are not impacted.

2. Copyright in photographs that were commissioned by an architect **prior to** November 7, 2012 will generally be owned by the **architect**, absent an agreement to the contrary. This means that you can for example, post such photographs on your website or in promotional materials, without obtaining permission from the photographer. You can also sub-license or transfer the copyright to a third party, including a client.

3. Copyright in photographs that were commissioned by an architect **on or after** November 7, 2012, however, is now presumed to be owned by the **photographer**, unless your contract states otherwise. This means that you cannot publish or reproduce photographs online or in promotional materials without the consent of the photographer. You also cannot sub-license or transfer the copyright to a third party, including a client, without such consent.

   Suggested wording for the architect/photographer contract should include working similar to:

   > "***name of the photographer*** hereby assigns all copyright and intellectual property rights to ***name of architect*** and waives all moral rights".

4. Be very clear in your future written agreements with photographers regarding what is and is not permitted, since the terms "commercial", "non-commercial", "private" and "personal" are not defined in the Act.

5. Do not forget about the impact of these amendments on your client agreements. For example, GC 3.1.15 and GC 3.1.16 of the OAA's Standard Form of Contract for Architect's Services (OAA 600-2013) provide, respectively, that the architect may:

   (i) provide a specifically commissioned physical model (maquette), architectural rendering, computer rendering or video, which becomes the property of the client, or

   (ii) provide specially commissioned photography or photographic records of site, existing conditions, construction or other.

If either of the foregoing is included in the architect's scope of services, the architect must be careful to obtain the proper rights from the commissioned creator (if applicable) in order to properly transfer ownership of the copyright to the client or grant rights of use. Ultimately, any amendment to any architectural services contract should be vetted by your own legal counsel to ensure your rights are protected.

These comments also apply to the other standard forms of contract located on the OAA Website and made available to architects.

6. Be aware that the *Copyright Act* (as amended) contains general exceptions permitting users other than the architect (or its clients) to use copyrighted works for certain purposes such as fair dealing, criticism, parody or satire, among others.

Consult with Legal Counsel

Always consult your own legal counsel if you have any questions regarding the application of the Act to your architectural practice or a specific fact situation.

Authorship

This Practice Tip was prepared by Emma Williamson and Aaron Milrad of Dentons Canada LLP, for and in consultation with the Ontario Association of Architects (OAA).

References

1. *Copyright Modernization Act* – review at Government of Canada Justice Laws website.
2. *Copyright Act* – review at Government of Canada Justice Laws website**.**
3. OAA 600-2013 Standard Form of Contract for Architect's Services – review at the OAA Website.