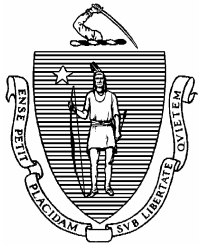


**MASSGIS STANDARD FOR
DIGITAL PLAN SUBMISSION TO
MUNICIPALITIES**

APPENDIX C

**Opinions from Massachusetts Information Technology Division
Concerning Copyright Protection for Digital Plan Submittals**



The Commonwealth of Massachusetts
Executive Office for Administration and Finance
Information Technology Division

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PETER J. QUINN
Chief Information Officer

MEMORANDUM

To: Neil MacGaffey
Office of Geographic and Environmental Information (MassGIS)

From: Stephanie Zierten, Deputy General Counsel ITD

Reviewed By: Linda Hamel, General Counsel ITD

Date: October 17, 2005

Re: Copyright Protection for Digital Plan Submittals

With this memo, we are providing counsel to the Massachusetts Office of Geographic and Environmental Information (MassGIS) regarding MassGIS's plans to issue a state level standard for digital plan submittals to its geographic information systems (GIS). The Legal Counsel's Office at ITD provides legal advice to the Information Technology Division and also provides counseling to other state agencies on an as needed basis regarding technology law. We have researched the question posed by MassGIS under Federal statutory and related case law and have also reviewed cases litigated under the Massachusetts public records law that are relevant to the discussion. Our conclusions are based on an analysis completed on October 17, 2005, thus if relevant statutory or case law is issued after date, the opinion may need to be revised.

Issue Presented

Would MassGIS or the municipalities violate a surveyor's copyright interest in his or her survey plan by requiring digital plan transmittal according to a standard format?

Summary

A surveyor likely possesses copyright protection in at least some of the information submitted as part of a digital plan. Thus, the use of the copyrighted work by municipalities and MassGIS must be limited in order to protect the surveyor's interest in the copyrighted work. Assuming that the Commonwealth's use of the information is non-commercial in nature, such use would unlikely infringe the copyright. However, should a third-party make a public records request of the information, the municipalities and MassGIS should comply with the public records law, but also give notice to the requestor that the use of such information is limited under the Federal copyright law and the public records law.

Background Facts

MassGIS is the Commonwealth's Office of Geographic and Environmental Information within the Massachusetts Executive Office of Environmental Affairs. MassGIS has the legislative authority to "set standards for the acquisition and management of geographical and environmental data by any agency, authority or other political subdivision of the Commonwealth." G.L. c. 21A § 4B. Under this authority, MassGIS plans to issue a state level standard for digital plan submittals regarding geographic information systems (GIS).

In general, a land surveyor is hired to perform a boundary survey to determine the legal boundary lines for a given parcel of land. In Massachusetts, land surveyors are licensed professionals who must comply with the requirements under 250 CMR 6.00 *et. seq.* for collecting and analyzing the data and presenting his or her conclusions to the client. As part of the surveying process, surveyors are often required to investigate deeds and other legal records and also perform field investigations using technical standards. See e.g. 250 CMR 6.01. The results of the investigation and analysis are often presented as survey or site plans, which are drawings depicting the boundary lines of the property and other relevant information (e.g. title block and monuments etc.). See e.g. 250 CMR 6.01(d) and 6.02(d).

Often, surveyors use computer-aided design and drafting (CADD) software to generate their plans. As drafted, the plans show the pre-existing boundary lines as determined by the surveyor. In addition, the surveyor could include depictions of the proposed use for the land within the pre-existing boundary lines (e.g. the parceling of the land for a sub-division, including placement of buildings, sewers, and other improvements). The typical client for these plans is a developer or builder. However, usually these plans are submitted by the developer or builder to the local governing authority of the municipality for approval. Each municipality requires that specific information be included in the plan, which depends on the type of proposed project (e.g. nursing home, housing development, proposed distribution of land).

The state level standard for digital plan submittals requires that survey plans submitted to municipalities conform to a standard format and content. The goal of this

program is to facilitate maintenance of map features and other information commonly found in municipal GIS databases (e.g. parcel boundaries, pipe infrastructure, building outlines etc.). The standard proposed by MassGIS is a subset of the information included in a traditional printed or CADD survey plan. For example, the standard does not require the submission of bearing information, the title block, board or notes.

Private surveyors are concerned that transmitting their surveying data in a standard format to the municipalities and in turn to MassGIS would undermine their copyright protection in the surveys. Thus, if MassGIS collects the data, there is a concern that MassGIS would be infringing on a surveyor's copyrighted expression unless the surveyor has granted MassGIS a license to reproduce the data.

Discussion

Copyright expression extends to "original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced or otherwise communicated." 17 U.S.C. § 102(a). Such works of authorship include pictorial, graphic, and sculptural works. 17 U.S.C. § 102(a) (5). Copyright protection extends to the author's expression, but does not extend to facts or ideas embodied in the expression that is the subject of copyright. Feist Publications v. Rural Telephone Service Comp., 499 U.S. 340, 349 (1991). Facts, unlike original expression, "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." Feist, 499 U.S. at 347.

The digital plans submitted by surveyors under the MassGIS standard will likely include a combination of non-copyrightable facts and copyrightable expression. See e.g. Sparaco v. Lawler, Matusky, Skelly, Engineers LLP, 303 F.3d 460, 465 (2nd. Cir. 2002) (holding that the portion of a site plan setting forth the existing physical characteristics of the site according to cartographic features was not entitled to copyright protection, but that proposed improvements to site consisting of detailed specifications for its preparation constituted "specific expression" and therefore that portion of the plan was entitled to copyright protection). For example, the survey information submitted regarding the pre-existing property boundary, dimensions, easements, right of way boundaries and survey monuments are physical characteristics of the site, and thus not entitled to copyright protection. Furthermore, the surveyors will not be uploading information regarding the pictorial portrayal of the survey map, such as the detail, size, shape, density, or color of the completed survey map. Thus, the data submitted will generally be lacking in creative expression, even as a compilation, and would therefore unlikely be subject to copyright protection. See Feist, 499 U.S. at 349 (stating that copyright expression does extend to factual compilations where the compiler has produced an original selection and arrangement of the facts; however such protection of factual compilations is thin). But see Hodge Mason and Hodge Mason Maps, Inc. v. Montgomery Data, Inc., 967 F.2d 135, 142 (5th Cir., 1992) (distinguishing pictorial or graphic subject-matter as distinct from other factual compilations and holding that plaintiff who used his skill and judgment in pictorially portraying his understanding of

the reality of the land in question by “drawing lines and symbols in particular relation to one another” was entitled to copyright protection in his survey maps).

In addition to the data regarding pre-existing physical conditions, the surveyors will also be submitting information regarding a proposed use of the site. This information is more likely to be protected under copyright law given that there may be many different variations for parceling given piece of land. As a result, the ultimate proposal selected and portrayed represents the author’s creative expression and vision rather than merely existing facts. See Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 43 (1st Cir., 2003) (stating that if the underlying idea is no more than a linked series of geographic points found in nature, there is no copyright protection, however when the information “expresses just one of many possible detailed and complex visions for developing the site” then the information garners protection). Given that the surveyors would be submitting a combination of data regarding pre-existing conditions and proposed use of the site, for the purposes of MassGIS’s analysis, a court of competent jurisdiction would likely hold that the surveyors had no copyright interest in the data regarding pre-existing physical characteristics, such as boundary lines, but that the data that captures the proposed improvements to the site plan would likely be entitled to copyright protection.

Assuming that the surveyors would have copyright protection in at least some of the data submitted under MassGIS’s proposed standard,¹ then a question arises as to whether publication or other use by the municipalities or by MassGIS of the survey diminishes the copyright protection because the survey has entered the public domain. While it is true that a work can lose its copyright protection when the work becomes embodied in a statute, judicial opinion or regulation, a copyrighted work does not lose protection merely because the work has been submitted to a government entity. See e.g. Oasis Publishing Comp. Inc. v. West Publishing Comp., 924 F. Supp. 918, 930 (D. Minn. 1996) (stating that “publication or other use by the government of a private work does not diminish copyright protection.”). See also Danielson, 322 F.3d at 42 (stating that the “filing of plans with the local government . . . alone does not undermine the copyright”). Compare Bldg. Officials & Code Admin. Int’l, Inc. v. Code Techn, Inc., 628 F.2d 730, 733-34 (1st Cir. 1980); Veek v. Southern Bldg. Code Cong. Int’l., 293 F.3d 791, 793 (5th Cir. 2002) (holding that private organization could not assert copyright protection for its model codes after the models were adopted into regulations and became law). In this case, the data is merely submitted to the municipalities for purposes planning, operational support and graphic display. Because the data is not incorporated into any legally binding authority, the survey data would retain the copyright protection it has upon submission to the municipality or the state.

Although not put in the public domain as embodied in law, after submitting the survey plans to government entities the plans would become a public record under the

¹ Typically, a subdivision plan is collaborative effort. The land surveyor maps the boundaries of proposed lots, but a civil engineer often resolves issues of drainage and wetlands. Thus, it is common for at least a civil engineer and a land surveyor to stamp a plan. Because the subdivision plan is a collaborative effort, the surveyors may have to share their copyright interest in the plan with the other authors. To simplify our analysis, we will assume that the surveyors represent the authors of the entire work. This assumption does not change the outcome of our analysis.

G.L. c. 66 § 10, the Commonwealth's public records law.² Pursuant to the public records law, the Commonwealth must permit the record "to be inspected and examined by any person ... and shall furnish one copy thereof upon payment of a reasonable fee." G.L. c. 66 § 10. In turn, because the public records law does not specifically exempt copyrighted records from public disclosure and copying, a surveyor could assert that compliance with public records law violates his or her copyright.

Under the copyright statute, the owner of a copyright work has the exclusive right to reproduce the copyrighted work and to distribute copies. 17 U.S.C. § 106. There are limitations on the exercise of these exclusive rights, including the statutory right of fair use. Specifically, 17 U.S.C. § 107 provides that a person can make fair use of a copyrighted work, including reproduction of the work, for purposes such as criticism, comment, news reporting, teaching, scholarship or research. 17 U.S.C. § 107.

In this case, MassGIS could take the position that fulfillment of a public records request constitutes fair use under Federal copyright law and therefore harmonize the seemingly conflicting Federal copyright statute and the public records law. Some courts have already taken this approach when faced with a challenge to a request under the state or Federal Freedom of Information Act and a conflicting claim of copyright. See e.g. Rea v. Ohio Dept. of Educ., 81 Ohio St.3d 527, 532 (1998) (holding that Federal copyright law did not prohibit release of state record where the parties seeking copy of record had no intention of copying the records for commercial resale and intended use came within fair use exception); Lindberg v. County of Kitsap, 122 Wash.2d 729, 745 (1997) (holding that copies of engineering drawings could be released in compliance with public records request because they were going to be used for comments and criticisms regarding the proposals). In County of Suffolk v. First American Real Estate Solutions, the Second Circuit Court of Appeals addressed the issue as to whether New York's Freedom of Information Law (FOIL) abrogated the county's copyright interest in tax maps. County of Suffolk v. First American Real Estate Solutions, 261 F.3d 179, 192 (2nd. Cir. 2001). The court held that the county could comply with FOIL and maintain its copyright interest by placing restrictions on how a record, if copyrighted, could be subsequently distributed. Id. The court noted that the county was "not attempting to restrict *initial access* but [was] attempting to restrict only the subsequent redistribution of its copyrighted works. There [was] nothing inconsistent between fulfilling FOIL's goal of access and permitting a state agency to place reasonable restrictions on the redistribution of its copyrighted works." Id. The court also noted that its reasoning was consistent with the fair use doctrine under copyright law, stating that the fair use doctrine "strikes a balance between the rights of a copyright holder and the interest of the public in disseminating the information." Id.³

² By definition, a public record includes "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof ... unless such materials or data fall within the following exemptions ..." that are not relevant here. G.L. c. 4 § 7(26).

³ There are four factors a Court will consider when determining whether the copying of a given work constitutes fair use including: (1) the purpose and character of the use, including whether the use is for

In fact, in Wood v. Skene the Massachusetts Supreme Judicial Court (S.J.C.) applied reasoning analogous to the court in Suffolk in case concerning copyright claims under the Massachusetts the public records law.⁴ Wood v. Skene, 347 Mass. 351 (1964). In Wood, the defendant alleged that the plaintiff had forfeited his copyright protection in his architectural drawings because the drawings had been filed with the building department as part of the permitting process. The court rejected this argument, holding that:

the filing requirement and [the public records law] G.L. c. 66 § 10, give the public the right to inspect and, if necessary, to copy the filed plans for purposes reasonably related to the objectives behind the filing requirement, for example to determine whether a building constructed in accordance with plans will comply with zoning and safety laws. That right does not extend to making copies which will impair the architect's . . . copyright and property in the plans. It is not the purpose of the filing requirement to facilitate and permit architectural plagiarism, or enable one to obtain free of charge the benefits of another's work and thus to 'reap where it has not sown.'

Wood, 347 Mass. at 363, quoting Int'l. News Serv. v. Associated Press, 248 U.S. 215, 239 (1918). Considering that a member of the public could indeed make a public records request for a digital plan, the scope of that request could be curtailed under the fair use doctrine and under the S.J.C.'s holding in Wood. The court in Wood concluded that the public filing of plans was for a limited purpose, and as a result, the subsequent redistribution of those plans could be curtailed. Similarly, MassGIS and the municipalities could assert that the uploading of the survey data is for limited purpose and any public records request related to the survey data must also subscribe to that limited purpose. For example, the municipalities and MassGIS could provide notice across each view of the GIS database informing the viewer that at least some of the information contained in the GIS database is copyright protected, and therefore the requestor's use and redistribution of the record is limited to under the public records law and the Federal copyright law.⁵

commercial or non-profit purposes; (2) the nature of the copyrighted work (more factual works warrant less protection); (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market value of the market. 17 U.S.C. 107.

⁴ The issue addressed specifically in Wood concerned whether the filing of the architectural plans constituted publication and thus impaired the architect's *common law* copyright claims. Before the effective date of the current copyright act, unpublished works were protected by common law rather than statutory copyright law. The common law copyright automatically terminated when the work was published by the author and unless the author had filed for statutory protection, the work immediately entered the public domain. Common law copyright has been almost totally pre-empted as of January 1, 1978, when the Copyright Act of 1976 became effective. 17 U.S.C. § 303(a). See 3-9 M.B. Nimmer & D. Nimmer, Nimmer (Nimmer) on Copyright § 9.09 (2005). Despite that the court in Wood analyzed this issue under common law copyright, the reasoning applies in this infringement analysis under statutory copyright given that the underlying issue is the same, i.e. whether the Commonwealth effectively divests an author of his or her copyright rights through publication (or limited re-distribution).

⁵ Under the Massachusetts public records law, the agency fulfilling a public records request can not require the requestor to disclose the reasons for seeking access or a copy of the record. 950 CMR 32.05(5). Therefore, the municipalities and MassGIS should provide a notice to requestors regarding the limited scope of use of such records and perhaps have the requestor affirm receipt of such notice.

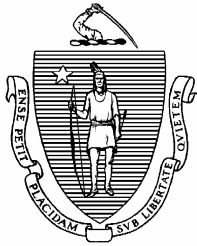
Conclusion

Should a surveyor challenge the dissemination of the digital plan submittals, a court of competent jurisdiction would likely hold that the surveyor has no copyright interest in the pre-existing facts submitted, such as boundary lines, but that he or she does hold an interest in the expression capturing the proposed use of the parcel of land. There are a couple of options MassGIS could pursue.

1. MassGIS could change the standard to only collect data regarding pre-existing conditions of the site. Because municipalities and MassGIS would only be collecting factual information, the surveyor's would arguably not have a copyright interest in such data and it could therefore be freely distributed. This approach may undermine the goal of the standard given that proposed use of the land, which creates new boundary lines within the subdivision, would not be uploaded into the system.
2. The municipalities and MassGIS could require that the information be submitted according to the standard, but also seek to protect the copyright interest held by the surveyors. For example, the municipalities and MassGIS could put a terms of use on the database and also include a notice in the response to the public records request informing the requestor of the limited use of such information under Federal copyright law and the Massachusetts public records law.

The second option would likely provide the surveying community with the assurances they need that they would not lose copyright protection by participating in the public process and submitting their digital plans. Interestingly, this same analysis applies in the traditional context, where a surveyor submits a hard copy plan to the municipalities. With such submittals, the surveyor likely enjoys copyright protection in some of the information, but not all. In addition, the municipalities and the state might today incur some obligation to protect the surveyor's limited copyright when disseminating copies of the survey sites, whether the dissemination is via hard copy or digitally.

Let us know if you have any other questions or if you would like us to help you prepare language regarding the copyright notice.



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PETER J. QUINN
Chief Information Officer

MEMORANDUM

To: Neil MacGaffey
Office of Geographic and Environmental Information (MassGIS)

From: Linda Hamel, General Counsel ITD

Cc: Stephanie Ziertan

Date: January 13, 2006

Re: Do the Copyrighted Elements of Surveys Lose Copyright Protection Over Time?

On October 17, 2005, Stephanie Ziertan, ITD's Deputy General Counsel, and I provided you with an opinion regarding the ownership of survey data that municipalities require that surveyors provide to municipal geographic information systems or GIS. All of the limitations as to the breadth of the opinion expressed in that document apply to this memorandum. Specifically, this opinion pertains to Massachusetts Office of Geographic and Environmental Information (MassGIS)'s plans to issue a state level standard for digital plan submittals to its geographic information systems (GIS). The Legal Counsel's Office at ITD provides legal advice to the Information Technology Division and also provides counsel to other state agencies on an as needed basis regarding technology law. Following the delivery of our initial opinion to you, I have researched a followup question posed by MassGIS under Federal statutory and related case law and have also reviewed cases litigated under the Massachusetts public records law that are relevant to the discussion. My conclusions are based on an analysis completed on May 30, 2006. If relevant statutory or case law is issued after date, this opinion may need to be revised.

Issue Presented

The October 15, 2005 memo from ITD addressed the question of whether MassGIS or the municipalities would violate a surveyor's copyright interest in his or her survey plan by requiring digital plan transmittal according to a standard format. ITD concluded that a surveyor likely possesses copyright protection in at least some of the information submitted as part of a digital plan. Thus, we advised you that the use of the copyrighted work by municipal and MassGIS must be limited in order to protect the surveyor's interest in the copyrighted work. Assuming that the Commonwealth's use of the information is non-commercial in nature, such use by the public sector is not likely to infringe the copyright. Third parties will also have access to the survey data under the public records law, without diminishing the scope of the surveyor's copyright interest. However, neither public agencies nor third parties may copy the survey data available through a public sector GIS for purposes exceeding "fair use" under U.S. Copyright law. We advised you that the municipalities and MassGIS should comply with the public records law and make such GIS data freely accessible, but also give notice to the requestor that the ability to copy such information is limited under Federal copyright law.

As a followup question, you inquired whether the expressive elements of surveys protected under U.S. copyright law could lose their protected status as they evolve from "expression" to "fact".

Short Answer

Some of the copyright protected data elements contained in a survey may over time lose their copyright protection as they evolve from mere expression to facts.

Background Facts

MassGIS is the Commonwealth's Office of Geographic and Environmental Information within the Massachusetts Executive Office of Environmental Affairs. MassGIS has the legislative authority to "set standards for the acquisition and management of geographical and environmental data by any agency, authority or other political subdivision of the Commonwealth." G.L. c. 21A § 4B. Under this authority, MassGIS plans to issue a state level standard for digital plan submittals regarding geographic information systems (GIS).

In general, a land surveyor is hired to perform a boundary survey to determine the legal boundary lines for a given parcel of land. In Massachusetts, land surveyors are licensed professionals who must comply with the requirements under 250 CMR 6.00 *et. seq.* for collecting and analyzing the data and presenting his or her conclusions to the client. As part of the surveying process, surveyors are often required to investigate deeds and other legal records and also perform field investigations using technical standards. See e.g. 250 CMR 6.01. The results of the investigation and analysis are often presented as survey or site plans, which are drawings depicting the boundary lines of the property and other relevant information (e.g. title block and monuments etc.). See e.g. 250 CMR 6.01(d) and 6.02(d).

Often, surveyors use computer-aided design and drafting (CADD) software to generate their plans. As drafted, the plans show the pre-existing boundary lines as determined by the surveyor. In addition, the surveyor could include depictions of the proposed use for the land within the pre-existing boundary lines (e.g. the parceling of the land for a sub-division, including placement of buildings, sewers, and other improvements). The typical client for these plans is a developer or builder. However, usually these plans are submitted by the developer or builder to the local governing authority of the municipality for approval. Each municipality requires that specific information be included in the plan, which depends on the type of proposed project (e.g. nursing home, housing development, proposed distribution of land).

The state level standard for digital plan submittals requires that survey plans submitted to municipalities conform to a standard format and content. The goal of this program is to facilitate maintenance of map features and other information commonly found in municipal GIS databases (e.g. parcel boundaries, pipe infrastructure, building outlines etc.). The standard proposed by MassGIS is a subset of the information included in a traditional printed or CADD survey plan. For example, the standard does not require the submission of bearing information, the title block, board or notes.

Private surveyors are concerned that transmitting their surveying data in a standard format to the municipalities and in turn to MassGIS would undermine their copyright protection in the surveys. Thus, if MassGIS collects the data, there is a concern that MassGIS would be infringing on a surveyor's copyrighted expression unless the surveyor has granted MassGIS a license to reproduce the data.

Discussion

Copyright expression extends to "original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced or otherwise communicated." 17 U.S.C. § 102(a). Such works of authorship include pictorial, graphic, and sculptural works. 17 U.S.C. § 102(a) (5). Copyright protection extends to the author's expression, but **does not extend to facts or ideas** embodied in the expression that is the subject of copyright. Feist Publications v. Rural Telephone Service Comp., 499 U.S. 340, 349 (1991). Facts, unlike original expression, "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." Feist, 499 U.S. at 347.

The digital plans submitted by surveyors under the MassGIS standard will likely include a combination of non-copyrightable facts and copyrightable expression. See e.g. Sparaco v. Lawler, Matusky, Skelly, Engineers LLP, 303 F.3d 460, 465 (2nd. Cir. 2002) (holding that the portion of a site plan setting forth the existing physical characteristics of the site according to cartographic features was not entitled to copyright protection, but that proposed improvements to site consisting of detailed specifications for its preparation constituted "specific expression" and therefore that portion of the plan was entitled to copyright protection). For example, the survey information submitted regarding the pre-existing property boundary, dimensions, easements, right of way

boundaries and survey monuments are physical characteristics of the site, and thus not entitled to copyright protection. Furthermore, the surveyors will not be uploading information regarding the pictorial portrayal of the survey map, such as the detail, size, shape, density, or color of the completed survey map. Thus, the data submitted will generally be lacking in creative expression, even as a compilation, and would therefore unlikely be subject to copyright protection. See Feist, 499 U.S. at 349 (stating that copyright expression does extend to factual compilations where the compiler has produced an original selection and arrangement of the facts; however such protection of factual compilations is thin). But see Hodge Mason and Hodge Mason Maps, Inc. v. Montgomery Data, Inc., 967 F.2d 135, 142 (5th Cir., 1992) (distinguishing pictorial or graphic subject-matter as distinct from other factual compilations and holding that plaintiff who used his skill and judgment in pictorially portraying his understanding of the reality of the land in question by “drawing lines and symbols in particular relation to one another” was entitled to copyright protection in his survey maps).

In addition to the data regarding pre-existing physical conditions, the surveyors will also be submitting information regarding a proposed use of the site. This information is more likely to be protected under copyright law given that there may be many different variations for parceling given piece of land. As a result, the ultimate proposal selected and portrayed represents the author’s creative expression and vision rather than merely existing facts. See Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 43 (1st Cir., 2003) (stating that if the underlying idea is no more than a linked series of geographic points found in nature, there is no copyright protection, however when the information “expresses just one of many possible detailed and complex visions for developing the site” then the information garners protection). Given that the surveyors would be submitting a combination of data regarding pre-existing conditions and proposed use of the site, for the purposes of MassGIS’s analysis, a court of competent jurisdiction would likely hold that the surveyors had no copyright interest in the data regarding pre-existing physical characteristics, such as boundary lines, but that the data that captures the proposed improvements to the site plan would likely be entitled to copyright protection.

Although not put in the public domain as embodied in law, after submitting the survey plans to government entities the plans would become a public record under the G.L. c. 66 § 10, the Commonwealth’s public records law.⁶ Pursuant to the public records law, the Commonwealth must permit the record “to be inspected and examined by any person ... and shall furnish one copy thereof upon payment of a reasonable fee.” G.L. c. 66 § 10.

No state or Federal court appears to have addressed your followup question regarding whether data elements from surveys that are expressive, not representative of fact, and therefore copyrighted when first uploaded to a GIS, are later stripped of

⁶ By definition, a public record includes “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof ... unless such materials or data fall within the following exemptions ...” that are not relevant here. G.L. c. 4 § 7(26).

copyright protection when the imaginary boundaries or improvements to which they refer become a reality. However, given that under Feist U.S. Copyright law does not protect “facts”, survey data elements that originate as pure expression and evolve into fact are unlikely, in my opinion, to continue to be subject to copyright.

The question remains as to under what circumstances survey data that is “born” as pure expression later becomes fact unprotected by copyright law . The easy case pertains to improvements noted on surveys. For example, a survey for an undeveloped piece of land may show the location of a sewer pipe running diagonally across the property that the developer intends to install in the future. The data elements related to the pipe are merely expressive at the time that surveyor creates them, at the time the municipality approves the plan for the land, at the time that the developer records the approved plan with the Registry of Deeds, and at the time that the municipality uploads the survey data into its GIS. But three years later when the developer actually installs the pipe, the survey elements in the GIS pertaining to the pipe, to the extent to which they match the location of the pipe as installed, have morphed from mere expression to cold fact, and the surveyor loses his copyright protection for those elements.

Similarly, boundary lines for individual lots to be created through subdivision of land first described in a survey are purely expressive when first drawn, approved by the local municipality, and uploaded into its GIS. The individual lots do not exist as a matter of law until recorded in the Registry. Once recorded, the lots become legally distinct from the original unitary lot and therefore data elements from surveys describing their boundaries pass from the realm of expression into that of fact. (In reaching this conclusion I have relied on an informal opinion from a real estate lawyer regarding the legal significance of recordation).

Conclusion

Of the copyrightable elements of a survey that may be uploaded into a GIS, some may become facts over time, and therefore lose their copyrightable status.