

Infringement: such a bad word!

Taking credit for a colleague's engineering work... nobody does that" Are you so sure? Here is an example. Your bid refers, in large part, to the regulation respecting safety standards in confined spaces. You've added a few contractual clauses that you found in a service agreement signed last year by a potential client and another supplier. You even copied the diagram, which, as it turns out, is perfectly tailored to your bid. Why reinvent the wheel each and every time, right? But by doing so, are you blatantly plagiarizing someone else's work? It's not so easy to figure it out!

INTELLECTUAL PROPERTY

In Canada, intellectual property refers to ownership of the expressions of intellectual work, creativity, intelligence and human ingenuity through different means. The framework for intellectual property law ensures the recognition and protection of Canadians' economic, social, scientific or personal interests which fall into one the five (5) categories of intellectual property, as defined by the Canadian Intellectual Property Office¹:

- Patents:
 - Cover new inventions or any new and useful improvement to an existing invention;
- Trade-marks:
 - Words, designs, or a combination of these, used to identify the goods or services of one person or organization and to distinguish these goods or services from those of others in the marketplace;
- Industrial designs:
 - Visual features of shape, configuration, pattern or ornament applied to a manufactured article;
- Integrated circuit topographies:
 - The three-dimensional configuration of electronic circuits embodied in integrated circuit products or layout designs;
- Copyright:
 - Protection for literary, artistic, dramatic or musical works (including computer programs) and other subject-matter such as performer's performances, sound recordings and communication signals.

ENGINEERS AND COPYRIGHTS

In Canada, the *Copyright Act* protects, namely, original literary works, regardless of their actual commercial value, or technical, scientific or artistic quality. A literary work can take the form of a bid, an agreement, a safety or work procedure, a co-ordinating plane or an expert report.

Protection exists without having to register the work, as long as it meets the originality requirements set forth in the Act and the author ordinarily resides in Canada. In order to

be original, the work must not constitute infringement, whether it be disguised or cumulative (infringement upon infringement).

The *Copyright Act* grants the author the exclusive right to produce, reproduce and publish the work. The courts have acknowledged that the engineer's plans are protected under the Act². The copyright holder is, as the case may be:

- The author of the work;

THE CODE OF ETHICS OF ENGINEERS SETS OUT CERTAIN PROFESSIONAL OBLIGATIONS THAT ARE BASED ON THE NOTIONS OF INFRINGEMENT AND COPYRIGHT.

- His or her employer, if the work is made during the course of the author's employment;
- The Crown, if the work is made or published through or under the direction or supervision of a government agency, unless stipulated otherwise;
- The Client;
- Another person, if the rights have been sold or transferred to this person.

When engineers are bound to an employer pursuant to an employment contract, copyrights relating to the plans, designs, software and other works made during the course of their employment belong to their employer. Consequently, engineers cannot reproduce, for their own account, the works they produced while they worked for those employers. However, the parties can agree that copyrights will belong to the engineer and stipulate to that effect in the employment contract.

In practical terms, agreements between engineers and their clients often contain clauses which state that copyrights belong to the clients, allowing them to do as they please with these rights in the future.

You find the last three paragraphs particularly relevant? So do I... which is why I copied and paraphrased excerpts from the Ordre des ingénieurs du Québec's Web site³. In fact, the following caption appears on the site's homepage of the site:

© Ordre des ingénieurs du Québec, Montréal, 2011 All rights reserved

Even if such caption did not appear, I would absolutely have to reference my source in order to comply with the Copyright Act. In other words, when engineers reference texts or excerpts of texts, drawings, sketches, etc of which

they are not the author and let others believe that they are the author, they are infringing copyright and can be held liable to civil or even penal action. The same goes for engineers who insert the caption "All rights reserved" in a text, an excerpt or a literary work, of which they are not the author.

The Canadian Intellectual Property Office ensures the application of the *Copyright Act*. For more information relating to protection mechanisms and possible sanctions, please visit the Office's Web site (www.cipo.ic.gc.ca).

THE CODE OF ETHICS OF ENGINEERS

Even though copyright falls under federal jurisdiction and is protected by the *Copyright Act*, the *Code of ethics of engineers* sets out certain professional obligations that are based on the notions of infringement and copyright. More specifically, an engineer whose actions amount to infringement is in violation of his duty to fulfill his professional obligations with integrity (section 3.02.01.). For example, using a template or a model when preparing a bid or other document without getting the author's permission or without even being concerned about the identity of the initial author could warrant disciplinary sanction for lack of professional integrity under section 3.02.01⁴.

Infringement or tolerating infringement between colleagues and during the course of their professional activities could also lead to an inquiry for dishonest or doubtful practices and a complaint with the Disciplinary council, pursuant to section 3.02.08 of the Code of ethics⁵.

Another undesirable yet common practice consists in cutting and pasting parts of regulatory texts or texts published by self-regulated bodies or guides published by public or para-public organizations without referencing the texts in question or without having the authorization to use them. A reference such as "This procedure is largely inspired by guide xyz published by organization abc and available on the following Web site www..." would be appropriate and would not only attest to your intellectual honesty, it would also show your knowledge of the applicable standards in your field of practice. In that respect, I hereby authorize you to use this reference and assign my copyright to society!

Also, it is imperative that we consider section 4.02.03 of the Code of ethics of engineers⁶ which deals with infringement with regard to relationships between engineers:

4.02.03. An engineer shall not abuse a colleague's good faith, be guilty of breach of trust or be disloyal towards him or willfully damage his reputation. Without restricting the generality of the foregoing, the engineer shall not, in particular:

a) take upon himself the credit for engineering work which belongs to a colleague;

[..]

The Disciplinary Council provides an example of a case that falls within the purview of this section⁷:

[129] In fact, the sixth count charges the respondent with having taken credit for his colleague's work [...] by signing and sealing mechanical plans M-1 through M-4[...].

[130] The respondent [...] claims that it was only the urgent need of obtaining municipal permits and the fact that his colleague was unavailable [...] to sign the plans that made him sign them himself.

[131] He argues that he acted in good faith, without any dishonest intention and, above all, without the intention assigned to him by the plaintiff, the assistant syndic [...].

[132] If it is true that the respondent did not wish to take credit for engineering work that belonged to a colleague, the fact remains that by putting his own seal and signature [...], according to the council, he took credit for his colleague's engineering work, namely with respect to the city of Chambly's authorities for the purpose of obtaining construction permits.

[133] Consequently, the respondent will be found guilty of the offence under the sixth count. [...] (Unofficial translation)

This reasoning applies for any type of engineering work, regardless of the hierarchical position of the person signing the document: a director cannot take credit for someone else's work under the sole pretence that he is his or her superior.

Therefore, it could be risky to sign and/or seal a document prepared, in whole or in part, by another engineer, without including the necessary nuances and references. For example, inserting a plan, or a part thereof, prepared by another engineer in your own design without obtaining the copyright holder's authorization and without identifying the author in the references constitutes a form of appropriation of engineering work, which could be subject to sanction under section 4.02.03 a). So, do you think you need to revise your practices in this matter? If so, it is never too late to do the right thing!

1. A guide to Copyrights, Canadian Intellectual Property Office, www.ic.gc.ca, p. 2.
2. *Netupsky et al. v. Dominion Bridge Co. Ltd.*, 1971, CanLII 172 (CSC).
3. gpp.oiq.qc.ca : Home > Engineering documents > Intellectual property > Means of protecting intellectual property.
4. Code of ethics of engineers (c. I-9, r.6), s. 3.02.01.
5. *Ibid.*, s. 3.02.08. : "An engineer shall not resort nor lend himself to nor tolerate dishonest or doubtful practices in the performance of his professional activities."
6. *Ibid.*, art. 4.02.03.
7. *Latulippe v. Paré* 22-02-0268, pages 35 and 36 (upheld on appeal); see also *Alaurent v. Rivard* 22-05-0322, Disciplinary Council decision, September 7 2006.