

CV-10-414169-00CP

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KEATLEY SURVEYING LTD.

Plaintiff

- and -

TERANET INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

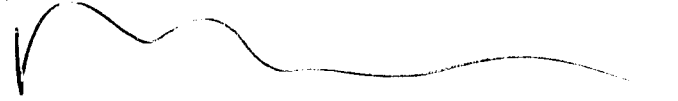
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE

TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 12, 2010

Issued by:


Local registrar (M. Brenton)

393 University Avenue
Toronto, Ontario
M5G 1E6

TO: Teranet Inc.
1 Adelaide Street E.
Suite 600
Toronto, ON
M5C 2V9

CLAIM

1. Keatley Surveying Ltd. (the “Plaintiff”) claims:
 - (a) an order pursuant to the *Class Proceeding Act, 1992*, S.O. 1992, c. 6 (“CPA”) certifying this action as a class proceeding and appointing him as representative plaintiff of the Class as defined below;
 - (b) an order pursuant to s. 24 of the CPA, directing an aggregate assessment of damages;
 - (c) general damages for the Class in the amount of \$50,000,000;
 - (d) a disgorgement of any profit Teranet Inc. (the “Defendant”) made by infringing the *Copyright Act*, R.S.C. 1985, c. C-42 (the “*Copyright Act*”);
 - (e) statutory damages for the Class under the *Copyright Act* in an amount to be assessed;
 - (f) a permanent injunction preventing the Defendant from dealing with documents that were authored by the Plaintiff or any member of the Plaintiff Class, or where the Plaintiff or any member of the Plaintiff Class is the owner of copyright, without the prior written consent of the respective owner(s) of copyright regarding the use of the documents he/she/they authored;
 - (g) punitive damages in the amount of \$1,000,000;
 - (h) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;

- (i) prejudgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. c. 43;
- (j) costs of this action, including the costs of notice and administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (k) such further and other grounds as may be required by the CPA, or as the lawyers may advise and this Honourable Court may deem just.

Overview

2. The Plaintiff is a professional corporation engaged in land surveying in the District of Manitoulin, Ontario. As described in greater detail below, the Plaintiff is the owner of thousands of drawings, maps, charts and plans created by the Plaintiff and other land surveyors (collectively, the “Plaintiff’s Works”). Each of the Plaintiff’s Works was original and required professional skill and judgment to create.

3. Pursuant to the *Copyright Act*, drawings, maps, charts and plans are “artistic works” which acquire copyright protection when they are created. There is no requirement under the *Copyright Act* to register such artistic works to acquire copyright. The Plaintiff is the owner of the copyrights in all of the Plaintiff’s Works.

4. A large number of the copyrighted Plaintiff’s Works have been registered and deposited in the provincial Land Registration Office for the District of Manitoulin and elsewhere in Ontario. No part of the process of registering, depositing or filing

copyrighted works in the provincial registry offices derogates from the federally-mandated copyrights in such works.

5. The Defendant or its agents have made unauthorized copies of the Plaintiff's Works without notice to the Plaintiff of any kind. These unauthorized copies are assembled by the Defendant in a database, along with unauthorized copies of drawings, maps, charts and plans created by other land surveyors in Ontario and similarly registered, deposited or filed in Ontario Land Registration offices (collectively, the "Surveyors' Works").

6. The Defendant sold unauthorized copies of the Surveyors' Works to members of the public for a fee. The Defendant collects money from the purchasers of the unauthorized copies and retains the entire purchase proceeds.

7. At no time has the Defendant notified the Plaintiff or other Class members that copies of their respective Surveyors' Works have been sold for a profit. Further, at no point has the Defendant sought to obtain the consent of the Plaintiff or other Class members to sell copies of their respective Surveyors' Works to members of the public.

8. The Defendant's business model is based on selling unauthorized copies of the Surveyors' Works for a profit in breach of the clear provisions of the *Copyright Act*.

The Plaintiff

9. The Plaintiff is a professional corporation owned and operated by Gordon R. Keatley, O.L.S., a duly qualified member of the Association of Ontario Land Surveyors. The Plaintiff's business operates in and around the District of Manitoulin, Ontario.

10. The Plaintiff was incorporated in 2007, when Gordon R. Keatley, O.L.S. took over the land surveying practice of his father, William J. Keatley, O.L.S., owner and operator of William J. Keatley Limited, a professional corporation.

11. At that time, the Plaintiff purchased all of the assets of William J. Keatley Limited, including all Surveyors' Works created by William J. Keatley, O.L.S. and William J. Keatley Limited, and the copyrights thereto, as well as works collected by William J. Keatley Limited from other Manitoulin Island land surveyors, and the copyrights thereto. The entire collection of Works held by the Plaintiff now amounts to more than 4,700 drawings maps, charts and plans.

12. The Plaintiff holds the copyrights in all Plaintiff's Works.

13. The Plaintiff brings this action on its own behalf and on behalf of all land surveyors in Ontario who are the holders of copyrights in the Surveyors' Works (collectively, the "Class").

The Defendant

14. The Defendant was incorporated in 2003 pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B.16, and became a private for-profit business.

15. The Defendant is presently in the business of managing Ontario's electronic land registration system for the benefit of its shareholders. In the course of doing so, the Defendant has gained "unprecedented access to the Ontario land registration system"¹.

16. The Defendant has taken advantage of its "unprecedented access" to the Ontario land registration system to create a profitable business which is premised upon offering for sale unauthorized copies of copyrighted Surveyors' Works prepared by the Plaintiff and other Class members.

17. The Defendant has offices in Ontario and is actively expanding its business model to other provinces across Canada.

18. The Defendant operates proprietary systems called Teraview and GeoWarehouse, which it uses as platforms for selling unauthorized copies of the Surveyors' Works to subscribers and members of the public.

The Copyright Breach

19. The Class members are the owners of the copyrights in the Surveyors' Works pursuant to sections 2 and 13(3) of the *Copyright Act*.

¹ <http://www.teranet.ca/services.legal.html> (as accessed on October 4, 2010)

20. As first owner of the copyright, the Class acquired the rights set out in s. 3(1) of the *Copyright Act*, including:

- the sole right to produce or reproduce the Surveyors' Works or any substantial part thereof in any material form whatever;
- the sole right to publish the Surveyors' Works;
- the sole right to produce or reproduce or publish any translation of the Surveyors' Works;
- the sole right to communicate the Surveyors' Works to the public by telecommunication.

21. Pursuant to s. 3(1) of the *Copyright Act*, the Class also acquired the sole right to authorize others to do such acts.

22. In addition, the Class acquired the moral rights to the Surveyors' Works, as set out in s. 14.1(1) of the *Copyright Act*, and the right to ensure that the integrity of the Surveyors' Works was not infringed, within the meaning of sections 28.1 and 28.2 of the *Copyright Act*.

23. In clear breach of the Class' copyrights, the Defendant or its agents made unauthorized copies of the Surveyors' Works deposited in the registry offices, without notifying the Class. The unauthorized copies were translated into a digital format, transmitted to the Defendant's data-receiving centre by telecommunication and stored in

the Defendant's electronic database. The Defendant then added the unauthorized copies of the Surveyors' Works to its index of documents available through Teraview and GeoWarehouse and communicated the Surveyors' Works to the public by telecommunication. The Surveyors' Works were offered for sale to the Defendant's subscribers and members of the public for a fee.

24. Upon payment to the Defendant, purchasers of the Surveyors' Works were free to print or download one or more unauthorized copies of the Surveyors' Works, without regard to the Class' copyrights therein.

25. Copies of the Surveyors' Works were translated into various digital formats, including Portable Document Folder (PDF) and Tagged Image File Format (TIFF), as well as being reformatted for printing in hard copy. Each format is an unauthorized translation of the original Surveyors' Works filed in the relevant registry office.

26. Pursuant to s. 27 (1) of the *Copyright Act*, it is an infringement of the Class' copyrights for the Defendant to do, without the consent of the owner of the copyright, anything that by the *Copyright Act* only the owner of the copyright has the right to do.

27. The Defendant infringed the Class' copyright in the Surveyors' Works by doing things, without the consent of the Class, that the Class has the exclusive right to do, including:

- (a) reproducing the Surveyors' Works or any substantial part thereof in any material form whatever
- (b) publishing the Surveyors' Works
- (c) producing or reproducing or publishing translations of the Surveyors' Works
- (d) communicating the Surveyors' Works to the public by telecommunication.

28. Pursuant to s. 27(2) of the *Copyright Act*, it is a secondary infringement of the Plaintiff's copyright for the Defendant to:

- (a) sell a copy of a work
- (b) distribute a copy of a work to such an extent as to affect prejudicially the owner of the copyright
- (c) by way of trade distribute, expose or offer for sale
- (d) possess a copy of a work for the purpose of doing anything referred to in paragraphs (a) to (c).

29. As described herein, the Defendant has engaged in all of these activities with respect to the Class' Surveyors' Works and has thereby engaged in secondary infringements of the Class' copyrights in the Surveyors' Works.

30. All copyrighted Surveyors' Works that the Class has deposited in the registry offices have been copied and offered for sale by the Defendant in the same way, without the Class' authorization or consent. The Defendant has infringed the Class' copyrights in all Surveyors' Works deposited by the Class in provincial registry offices.

31. At no time has the Class been notified of the unauthorized sales of any of the Surveyors' Works. Information regarding the sales of such works by the Defendant, including the number of sales and the funds received by the Defendant, has not been disclosed by the Defendant.

32. The Defendant's wholesale appropriation of the Surveyors' Works for commercial purposes using the internet to sell unlimited numbers of unauthorized copies – each one a complete copy of all or substantially all of the original work, and each one competing directly with the Class' professional work – constitutes an unfair dealing with the Surveyors' Works.

33. At the present time, the Defendant has more than 900,000 unauthorized copies of Surveyors' Works in its database, which it offers for sale twenty-four hours a day, seven days a week. The revenue generated by the Defendant from the sale of unauthorized copies of copyrighted Works of the Proposed Class exceeds \$10 million per year, none of which is distributed to the copyright holders – the Plaintiff and Class members.

34. Each act of infringement carried out by the Defendant infringed equally the rights of the proposed Class members in respect of the Surveyors' Works.

Moral rights

35. The Defendant has infringed the Class' moral rights in the Surveyors' Works, contrary to sections 14.1(1), 28.1, and 28.2(1)(b) of the *Copyright Act*, by touting such works as products and services of the Defendant, to the prejudice of the honour and reputation of the authors, when such works are not associated with the Defendant in any way – except to the extent that they have been misappropriated by the Defendant.

36. The Class is obligated under s. 33(2)(e) of R.R.O. 1990, Reg. 1026, made pursuant to the *Surveyors Act*, R.S.O. 1990, c. S.29, to ensure that clients are “aware of the complexity of the type of surveys recommended” and the nature of fees for service. The Defendant has undermined the moral and professional integrity of the Surveyors' Works to the prejudice of the honour and reputation of their respective authors, by selling unauthorized copies of such works without making the purchasers aware of the complexity of the type of surveys purchased.

37. The Defendant has also infringed the moral and professional integrity, to the prejudice of the honour and reputation of the authors of the Surveyors' Works by selling time-sensitive Works as *current* Works, and without advising purchasers that the accuracy of any given Work is limited to the date when the Work was completed.

38. The Class is required by s. 6 of the *Performance Standards for the Practice of Professional Land Surveying*, O. Reg. 216/10, made pursuant to the *Surveyors Act*, R.S.O. 1990, c. S.29 to “retain and maintain its records in a secure manner” in

accordance with the *Surveys Act*, R.S.O. 1990, c. S. 39, for records prepared for cadastral surveys and the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B., for all other records. The Defendant has breached the moral and professional integrity of the Surveyors' Works to the prejudice of the honour and reputation of their respective authors, by selling unlimited copies of such works without regard to those ethical obligations.

39. Pursuant to s. 29(3) of O. Reg. 1026, made pursuant to the *Surveyors Act*, R.S.O. 1990, c. S.29, a "print of a plan of survey is not a valid copy unless it bears the embossed seal of the licensed member who signed the plan or the embossed seal of a licensed member employed by the corporation or public agency responsible for the plan's preparation or the corporate seal of the corporation holding a certificate of authorization that was responsible for the plan's preparation." The Defendant has breached the moral and professional integrity of the Surveyors' Works to the prejudice of the honour and reputation of their respective authors, by selling distorted, mutilated or otherwise modified copies of such works without the required *indicia* of validity and without indicating to the purchasers that such copies are invalid.

Remedies

40. The Plaintiff and the other Class members are entitled to compensatory damages for, *inter alia*:

- (a) the loss of competitive advantage; and
- (b) the destruction of moral rights.

41. The Plaintiff and the other Class members are entitled to a remedy by way of accounts or delivery up from the Defendant in respect of the Defendant's infringement of copyright.

42. The Plaintiff and the other Class members seek a remedy by way of compensatory damages, accounts, and delivery up for infringement of its moral rights.

43. The Plaintiff and other Class members say that the Defendant has been unjustly enriched as a result of the infringement of the copyright and moral rights.

44. The Plaintiff and the other Class members seek from the Defendant a disgorgement of any profit it made in connection with its unauthorized reproduction, publication, communication, sale, distribution, translation, or dissemination of the Surveyors' Works.

45. The Plaintiff and the other Class members are entitled to statutory damages as set out in section 38.1 of the *Copyright Act* in respect of each of the Surveyors' Works.

46. The Plaintiff and the other Class members seek the maximum amount under the *Copyright Act* for statutory damages for each act of infringement, that is, \$20,000 for each of the Surveyors' Works included in the Defendant's database.

47. The Plaintiff and the other Class members seek an order pursuant to s. 38(1) of the *Copyright Act* for return and removal of all infringing copies of the Surveyors' Works in the Defendant's possession.

48. The Plaintiff and the other Class members seek a permanent injunction enjoining the Defendant from making any further copies of the Surveyors' Works without the explicit consent to do so from the creators of those works, pursuant to section 39.1 of the *Copyright Act*.

49. The Plaintiff and the other Class Members seek a permanent injunction enjoining the Defendant from dealing with, in any way or fashion, copies of Surveyor's Works that it currently has in its possession.

Punitive damages

50. The Defendant is a large, sophisticated corporation with in-house legal advisors and internal expertise in copyright law. The Defendant knew or ought to have known that large-scale, unauthorized copying of the Surveyors' Works for profit would infringe the Class' copyrights, and knew or ought to have known that enabling their subscribers and members of the public to infringe copyrights in the Surveyors' Works constituted secondary infringements of the copyrights of the Class members.

51. The Defendant's flagrant, high-handed and reprehensible decision to proceed with large-scale, unauthorized copying in the face of such knowledge was contrary to ordinary

standards of decent commercial behaviour, which warrants an award of punitive damages.

52. The Plaintiff pleads and relies on the CPA, the *Courts of Justice Act*, and the *Copyright Act*.

53. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario.

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November 12, 2010

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- AND -

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Solicitors for the Plaintiff

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KEATLEY SURVEYING LTD.

- and -

TERANET INC.

(Plaintiff)

(Defendant)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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