ONUS OF THE OWNER

Kevin D. Pomfret, Esq.
Executive Director,
Centre for Spatial Law and Policy; Partner, LeClairRyan
Kevin.Pomfret@leclairryan.com

Though a data owner might have agreed to share data and waived his intellectual property rights towards data, he still has a liability if the data is misused

Imagine you sold a car to someone you didn't know very well. After they bought the car you would not care what they did with it, how fast they drove, what they used it for or what happened in it. You probably wouldn't give that person or the car a second thought.

Now imagine that instead of selling that car, you let that same person borrow your car. You would be very concerned both about the person and what he would do with your car. Why? Because ultimately you would be responsible for what happened to the car. For example, you might ask them to obey all laws because you would not want to end up paying a parking ticket. You might ask them what they were planning on do with the car, because you did not want to get a call from law enforcement a week later telling you that your car had been involved in a crime. You might also check to see if the person had a valid driver's license and was not otherwise impaired from driving, as you would not want to be responsible if he got into an accident and injured someone.

You would probably remind them that you were loaning it just to them, so they shouldn't let other people drive it without your permission. You might also warn them that the car was old and needed some repairs, so that they wouldn't be surprised - and blame you - if the car broke down. The person borrowing the car would not be surprised to be asked these questions or to make these promises. He would not see these as unreasonable restrictions on his ability to use the car. Instead, he would understand that you were financially and legally responsible for the car and that these questions were reasonable.

Now imagine that instead of a car you were letting someone borrow a spatial data set. For example, a government agency or institution has agreed to share its data with others at no cost and with no restrictions on use, copying, modification, etc. In effect, the agency has agreed to waive its intellectual property rights on the data and to let someone else borrow it. However, a lawyer representing the government agency might still ask the borrower (or licensee) to make certain statements or promises much like the car owner did above. For example, a lawyer might ask the user to state that he will only use the data in a manner that complies with all applicable laws.

The lawyer might also ask the user to acknowledge that

Many potential users of spatial data are unhappy with the language in a license or the data sharing agreement

the data is only fit certain specified uses, so that there is never any doubt in the future as to what the data could be used for. He might also ask the user to agree that he will not sue the data provider if there are any errors in the data set. Unfortunately unlike the borrower of a car, many potential users of spatial data are unhappy at being asked to agree to such language in a license or data sharing agreement. They claim that these restrictions make data sharing too difficult and cumbersome. They accuse the lawyer of placing unreasonable restrictions on the data's use. Why, they will often ask, do you need these restrictions when the intent is to make the data freely available for the greater good? Some might even suggest that the data provider is still trying to exercise its intellectual property rights, in contravention of the spirit of the agreement to share data. However, it is important to understand that in agreeing to waive its intellectual property rights, a data provider has not given up its responsibilities of ownership. A data provider still needs to worry about being responsible (or liable) if someone is injured as a result of the data or if the data is collected, used or shared in a way that violates privacy, national security or other laws. By including the promises and statements described above in a license agreement, a lawyer is not exerting his or her client's intellectual property rights; he or she is simply trying to protect a client from potential risks.

It is the responsibility of the data user - much like the borrower of the car - to help the data provider get comfortable with these risks or show it how and why these risks are not significant.

Over the past decade, rapid changes in technology have greatly reduced the cost and difficulty of collecting, using and distributing spatial data sets. Broad recognition of the importance of interoperability and the adoption of standards have also greatly facilitated the transfer and sharing of spatial data between organisations. As a result of these advancements, there is a growing push for government agencies to share spatial data sets with both government organisations as well as with private businesses, organisations and citizens.

This push is taking place at the international level - such as with the Haiti relief efforts and the Global Earth Observation System of Systems (GEOSS) - and at the national, regional and local levels - through such efforts as spatial data infrastructures. This push for sharing data is well intentioned and motivated by increased recognition of the value and versatility of spatial data in solving many of the major issues before the global community today. However, the sharing of data does not go without risk for those that collect spatial data. These risks may appear insignificant or unlikely to a user, however they can seem very real to legal counsel, particularly given the inability of the legal and policy communities to keep pace with the rapid advancements in and development of spatial technology. This inability results in great uncertainty for lawyers and increases the perceived risk. It is incumbent upon both data providers and users to recognise and address these risks so that spatial technology can be fully utilised. ■

There is a growing push for govt agencies to share spatial data sets with both govt organisations as well as with private businesses and citizens.