

Document Ownership

Many clients look at professional services as a commodity. With surveys, reports, plans, specifications, and other documents viewed as "products," it is important to understand intellectual property rights intrinsic in professional services. Design professionals need to contractually address business and liability issues relating to the use and ownership of deliverables and any rights to use those deliverables if the professional service relationship is terminated.

USING DELIVERABLES AS LEVERAGE

Design professionals provide services; deliverables are instruments used to provide those services. Although these instruments of service are not products of a professional relationship, they do have commercial value. Therefore, the ownership rights in instruments of service should not transfer to the client or another party unless all fees and reimbursables are paid. Ownership of deliverables is the major leverage factor a design professional has in obtaining payment.

ADDRESSING LIABILITY EXPOSURES

By transferring title ownership and copyright of instruments of service, a firm is giving up control over the use or reuse of those instruments. When a firm signs and seals documents, the firm identifies itself as responsible for their content. As a result, firms may have to defend against future meritless claims based on inappropriate use of their documents. Any transfer should be in exchange for the client's commitment to defend and indemnify claims from the client's future use.

OBTAINING PROTECTION THROUGH COPYRIGHTS

Under industry standard forms, not only does ownership of instruments of service remain with the design professional, so do the copyrights, which constitute separate property rights. This reservation of ownership recognizes that a firm is retained and compensated for special expertise, knowledge, and skills expressed through instruments of services. Clients do not pay for documents, they pay for professional services.

Ownership of documents is distinct from ownership of the copyright in those documents. A copyright exists even without any action to register the copyright. This right prohibits others from reproducing documents, creating derivative works based on those documents, and distributing the documents to others. Merely possessing one set of documents does not alter the copyright in those documents.

TRANSFERRING "WORKS MADE FOR HIRE"

Copyright law allows the transfer of rights in intellectual property from the creator to the client. Simply calling the deliverables "works made for hire" may not effect this transfer. Unless there is a written assignment of copyright, the client may not gain any control.

CONTROLLING DOCUMENTS UPON TERMINATION

Standard agreements grant the client a limited license to reproduce instruments of service solely for purposes of construction and operation of a project. Any termination of the design contract automatically terminates the client's license. If termination does not trigger the firm's agreement to extend the license, the client cannot use those documents to complete the project.

Often, when a design professional's contract is terminated, the parties trade the right of continued use of the documents for the payment of all sums due and the release of the firm from any future claims. If the client can terminate the contract for its convenience, precautions should be taken to preclude the transfer of rights in the instruments of service without appropriate compensation and liability protection.

Because the use or misuse of instruments of service affects specific rights and obligations of the client, construction team, and public, a licensed professional should retain ownership of, control over, and responsibility for those instruments. Any ownership transfer provision should be considered carefully.

Protect Your Plans

The last few issues of *Design/Build Business* have generated quite a bit of feedback on releasing plans, appropriate fees for plans and protecting them. Another important aspect of this issue is copyright.

Assuring the protection of your designs is vital in order to protect not only your designs, but also your liability.

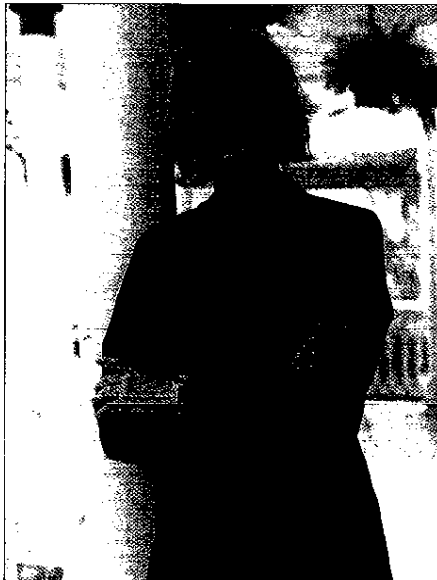
While a copyright notice is no longer required under U.S. law, it can be beneficial. Given the increasing number of lawsuits against builders and architects, going the extra mile protects your works, and reduces liability.

Use of the copyright notice informs the public that the work is protected, identifies the copyright owner and shows the first year of publication. According to the Library Of Congress' Copyright Office, in the event that a work, which carries the proper notices is infringed, the court will not give any weight to a defendant's interposition of an innocent infringement defense — that the infringer didn't realize the work is protected. The office states that an innocent infringement defense may result in a reduction in damages that the copyright owner would otherwise receive.

A notice of copyright can also be your best defense against a homeowner passing your plans on to a friend or another industry professional to use your design. When a work is published, a notice of copyright can be placed on all publicly distributed copies. The use of the notice, according to the government, is the responsibility of the copyright owner and does not require permission from, or registration with the Copyright Office.

To assure your plans include a form of notice, the Copyright Office says three elements should be included on any documents that are "visually perceptible," which includes copies that can be seen or read either directly or with the aid of a machine. The elements are the symbol (the letter C in a circle) or the word Copyright or the abbreviation "Copr."; the year of the first publication; and the name of the owner of the copyright in the work.

There are two good resources for further information on copyright issues. The American Institute Of Building Design (www.aibd.org), which includes the Council Of Publishing Designers, is an excellent resource for copyright and liability issues as they pertain to architects, designers and builders. The association offers publications on the topics and a copyright stamp for plans. The Copyright Office (www.copyright.gov) has a number of its circulars on various copyright issues available online and provides information on registration, licensing and copyright law.



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