increased value of copyright ownership creates more leverage for you in negotiating to obtain contract concessions limiting your liability for reuse of your design. A sample clause could read:

> CLIENT acknowledges that DESIGN PROFESSIONAL's reports, plans, specifications, and designs are instruments of professional service, and not products. Although such instruments are normally retained by DESIGN PROFESSIONAL, in this instance they shall become the property of CLIENT. Reuse of said documents without the express written permission of DESIGN PROFESSIONAL is prohibited. Such authorization is essential, because it requires DESIGN PROFESSIONAL to evaluate the documents' applicability to changed circumstances, not the least of which is passage of time. Accordingly, in return for DESIGN PROFESSIONAL's relinquishment of ownership and copyright, CLIENT agrees to waive any claim against DESIGN PROFESSIONAL and to defend, indemnify, and hold harmless DESIGN PROFESSIONAL from any claim or liability for injury or loss allegedly arising from unauthorized reuse of DESIGN PROFESSIONAL's instruments of service. The CLIENT further agrees to compensate the DESIGN PROFESSIONAL for any time spent or expenses incurred by the DESIGN PROFESSIONAL in defense of any such claim, in accordance with the DESIGN PROFESSIONAL's prevailing fee schedule and expense reimbursement policy.

Such a clause may be your best defense against unauthorized reuse of your materials if you relinquish copyright and ownership rights. You may also wish to negotiate a provision which will allow you to later use derivatives of your own designs.

POTENTIAL LIABILITIES

Considering the potential penalties under the Act, it is now more important than ever to avoid infringing someone else's copyright. Begin by establishing a "due diligence" program within your firm, perhaps by vesting in one individual responsibility for all copyright matters. This individual will be responsible for helping to assure that your designs do not infringe on existing copyrights. Similarly, when replacing another architect or engineer on a project, this individual would ascertain who has ownership of plans which you may be asked to revise or duplicate, and could make certain that any needed authorizations are obtained. After the due diligence check is done, your firm's copyright designation should be placed on all design and construction documents, especially those distributed out of the office, and a log of when those documents were created and to whom they were sent should be kept.

When dealing with independent contractors, make certain that, where designs and plans are intended to be "works made for hire," your agreements clearly indicate that intention. Remember, the author of the work will *automatically* hold the copyright unless alternative ownership is established. Also, a review of all current and pending agreements is advised to help assure consistency of design ownership.

INDEMNIFICATIONS

In the past, many clients have sought indemnity for copyright infringement, and more will do so in the future. If a client insists on such indemnity, attempt to negotiate a provision that provides indemnity only for *willful infringement*. The institution of due diligence procedures will presumably limit the potential for these types of infringement violations. As for matters relating to unwilling infringement, carefully review your professional liability insurance. Many such policies exclude coverage for copyright infringement, even when arising out of negligence.

For more information regarding professional liability insurance and coverage for copyright infringement, contact your PLAN agent.

or the use of materials in new or creative fashion, may not be copyrighted under the Act.

PROTECTION UNDER THE ACT

Copyright protection penalizes the unauthorized use, copying, or *modification* of the original design. It also penalizes construction of derivative works. However, copyrighting a building or engineering design cannot prevent an owner from later altering or even destroying the structure.

Penalties for infringement are divided into two categories: — statutory and compensatory — and depend on the violation's characterization as "innocent" or "willful." Under the new law, you no longer are required either to place a copyright notice on your works or to register them in order to protect your rights. Nonetheless, doing so is worthwhile because damages available vary depending on whether notice is provided or the design is registered with the copyright office.

Placing a notice of copyright on your works serves as a clear warning to others that a copyright is in effect, and eliminates the argument that infringement was unintentional. This means that, when seeking damages for unauthorized use of a design, the infringing party will have the burden of proving that its actions were not willful. Notice is given simply by placing on each document or computer disk containing elements of the design either the copyright symbol or the word Copyright, the year, and the name of the copyright holder.

Registering a copyright with the copyright office is only slightly more complicated. You need only complete an application and include a copy of the protected work along with copyright fee, and send it along to the copyright office. The procedure is not difficult and may usually be accomplished without the aid of a lawyer. The additional protections derived from registration relate particularly to statutory damages, which are available only if the design is registered. These damages range from $200 for "innocent" infringement to $100,000 for "willful" infringement, and can be collected without showing an actual injury.

Compensatory damages for infringement may be available regardless of the means used to protect the design. In order to collect compensatory damages, the author must bring a separate infringement suit. Compensatory damages provide for the actual loss to the designer as a result of the unauthorized use of the copyrighted work. These damages are usually measured by the fee lost for not being employed to design the structure. The courts may also award damages based on the profits earned by the infringer as a result of the infringement and the reasonable attorney fees needed to prosecute the case. In rare instances, the courts even may order that the copy-cat structure not be built.

OWNERSHIP OF THE DESIGN

Unless transferred by contract, "authors" own a copyright interest in any original work they create. Authors are the persons or entities that control and direct the creation of the work. Where the author is an individual design professional, the Act automatically vests that individual with a copyright interest upon completion of a "tangible expression" of the building, such as a design sketch or blueprint. A partnership or corporation will be the copyright holder if the "work was made for hire," i.e., created by an employee within the scope of employment. However, this applies only when the employee is part of a traditional employer/employee relationship. An independent contractor may be deemed the author of a work unless contractual provisions clearly place ownership elsewhere.

As a result of the new law, your designs now have significantly greater value. For this reason, many clients will insist on ownership of any design they commission, including the copyright. This raises the serious issue of unauthorized reuse or "recycling" of the design.

PROTECTING AGAINST REUSE

When designs are reused, the potential for a claim against the design professional increases greatly. Often injuries or other damages will result because your plans and specification were applied to different and inappropriate circumstances. Designer ownership of the copyright acts as an impediment to recycling, as any reuse or alteration of the original design may only be made with the copyright holder's permission. However, if the owner is unwilling to allow you to maintain ownership of the copyright, *make certain you are protected*. Now, this protection should be easier to obtain, because the

A/E RISK REVIEW

A PUBLICATION OF THE PROFESSIONAL LIABILITY AGENTS NETWORK

COPYRIGHT PROTECTION OF ARCHITECTURAL DESIGNS

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On December 1, 1990, the Architectural Works Copyright Act was signed into law. The Act became necessary when the U.S. became a signatory to an international treaty known as the Berne Convention. The Convention required that Congress update U.S. copyright laws relating to architectural works. The resulting law offers new protection for design professionals, as well as creating potential new liabilities.

WHAT CAN BE COPYRIGHTED?

Prior to enactment of the law, U.S. copyright protection extended only to graphic or pictorial representations of an architectural design. Under the Act, a new category of copyrightable materials was created: architectural works. An architectural work is defined as the "design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." This means that protection is now extended to the design itself. In order to be eligible for copyright under the new law, the works to be protected must have been created after December 1, 1990. This includes unbuilt structures which had been embodied in unpublished plans prior to that date.

The Act applies only to architectural works intended for human use or occupancy. As a result, only housing or commercial structures such as office buildings, homes, shopping centers, churches, or pavilions may be copyrighted. The copyright protects the overall design and shape of a structure, as well as the unique arrangement and composition of the spaces created inside. But protection under the Act ends there. Attendant or ancillary structures such as roadways, walkways, dams, or bridges are not eligible for copyright, nor are individual standard features such as doors or windows. Similarly, the Act excludes design protection for elements dictated solely by utilitarian concern. Essential facilities whose placement or design is restricted to one application,