

Document Ownership and Control

Issue:

Your client has requested your production of “works for hire” that it can convert into a facilities management program and use for future changes and additions to the project.

Concern:

Design professionals are not retained to produce documents such as plans and specifications; they are retained to perform services that may be expressed through instruments of service such as reports, studies, plans and specifications. This is an important distinction and one that often confuses both design professionals and their clients.

You can protect your client and yourself if the transfer of any or all of your rights is accomplished in a careful manner, rather than blindly transferring all of the rights, title or use of your documents by referring to such instruments of service as “works for hire.” Under the consensus standard documents, the design and ownership of the documents, and the right to use the information contained in the instruments of service are all retained by the design professional. The client is given a right to retain copies for information and reference purposes in connection with the use and occupancy of the project, but it is clearly stated that the documents are not intended for reuse by the client or others for modifications to the project or on any other project.

Response:

It is important to understand your ownership rights regarding your instruments of service, to control their use and copying, and to reuse the ideas expressed in the documents. All of these rights can be transferred, but any trans-

fer should be carefully negotiated so that the interests of all the parties are recognized and accommodated. One of these interests is the liability exposure to you that might occur from the misapplication of the instruments of service.

Protection for you and your client is aided through the use of a provision that reserves your right to reuse information contained in the drawings and specifications and disclaims any warranties that might exist if the plans are considered a product. The provision should also commit the client to taking sole responsibility for any future use of the documents and to indemnify you for any claims, costs, losses or damages resulting from any future use.

Resources:

The instruments of service section in Paragraph 1.3.2 of AIA B141 (1997 edition) affirms ownership of the documents by the design professional and the design professional's consultants, but provides a “nonexclusive license” for the use of the documents by the client “for purposes of constructing, using and maintaining the Project.” Similar language preventing reuse of the documents is in Paragraph 6.04 of EJCDC 1910-1 (1996 edition). The EJCDC language provides greater detail about the reliance on both client and design professional-provided information, and on the use and transfer of electronic information.

Schinnerer has also published additional information on this and similar issues. See *Electronic Information Transfer* in this publication, related articles on the Schinnerer Web site, www.schinnerer.com, and in Paragraphs 8 and 9 of the “Terms and Conditions Review Guide.”

Commentary:

The Copyright Act of 1976 and the Architectural Works Copyright Protection Act of 1990 recognize that design professionals have more than one interest in the instruments of service created during the performance of design services for a client. These rights can be inadvertently transferred or extinguished. In most situations, the eradication or conveyance of these rights have their most significant impact on compensation or reputation, but some professional liability issues also arise.

Under copyright law, “works for hire” arrangements transfer the rights of the originator of the documents. While this makes sense in an employee-employer relationship, it can jeopardize the ability of a design professional to function when applied to a client-design professional relationship. The consensus documents indicate that all the rights in the design and design documentation belong to the design professional, but they authorize the client to retain a copy of the information and to use the licensed information in its normal activities. Therefore, the design professional owns the design and the instruments of service that express that design as well as the legal right to control the use of those instruments of service in all but the case of the limited license assigned to the client.

If the client requests a transfer of both the ownership of the instruments of service and the copyrights for the documents and the design, the design professional may be exposed to claims from future use of the instruments of service or from “patent or latent defects” in the design. Perhaps of even greater concern

is that the originating design professional may be impeded from future use of derivatives of those instruments of service on subsequent projects for other clients.

Design professionals, clients and even third parties, such as contractors, have specific interests in and need to use the documents and the information contained in those documents. The consensus documents establish a system of ownership and licensing that accommodates these interests. Calling the instruments of service “works for hire,” however, transfers the rights of the design professional and may result in unintended financial or liability difficulties.

While, in most cases, clients use plans and specifications for maintenance or facility management purposes and do not attempt to use them inappropriately for other projects or for changes to the original project without appropriate modifications, it is prudent for design professionals to clearly indicate the ownership and appropriate use of plans, specifications and other documents in the professional service agreement, and to transfer only those rights that are clearly identified in exchange for appropriate compensation and legal protection.



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The information presented here is for professional liability risk management guidance. It is not legal advice nor should it be construed to be a determination on issues of coverage for specific claims. Contract language establishes legal duties and rights and should be reviewed by competent local legal counsel.

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& Company, Inc.