



Who Owns the Plans—Builder or Designer?

by Michael C. Loulakis and Jeffrey G. Gilmore

Developers often use contract documents generated for one project to help in the design or construction of later projects. When this occurs, is the original designer entitled to compensation for the subsequent use of the plans?

Developers argue that they paid the architect or the engineer once for these documents and therefore are free to use them as they wish. Designers counter that developers do not pay for the documents but rather pay for the services required to generate the documents. Consequently, designers believe that, as

After the second apartment complex was completed, the designers copyrighted the original plans, then took legal action.

owner of the documents, they are entitled to be paid again if the developer uses the plans again.

The ownership rights to contract documents often can be clarified when the contract is drafted. One clause that can be used is found in Article 8.1 of the American Institute of Architects Form B141, which states in part:

Drawings and Specifications as instruments of services are and shall remain the property of the Architect whether the Project for which they are made is executed or not....The Drawings and Specifications shall not be used by the Owner on other projects, for additions to this Project, or for completion of this Project by others...except by agreement in writing and with appropriate compensation to the architect.

If developers fail to abide by such a clause, then they are likely to be liable to the designer for damages under breach-of-contract theory.

Liability and Copyright Laws

Even if this issue is not covered in the contract, a developer may still be liable for unauthorized use of plans and specifications under the federal copyright laws. This situation was illustrated in a 1982 case in the federal district court of Nebraska, *Aitken, Hazen, Huffman, Miller, P.C. versus Empire Construction Co.*

The plaintiff in the Aitken case was an architectural firm that was engaged, through an oral contract, to design an apartment complex. The complex was located on one parcel (parcel III) of a subdivision owned by

Empire, a land-development company. The architectural firm contracted with the general contractor, Belmont, whose president and major stockholder was the sole owner of Empire. Under this contract, the design firm was paid for its services on an hourly rate, and there was no discussion of who would own the plans and specs generated.

After the apartments on parcel III were completed, Empire hired Belmont to construct another apartment complex on parcel II, which adjoined parcel III in the subdivision. General contractor Belmont, without the permission or knowledge of the plaintiff, copied the architectural plans for parcel III, had them reviewed and sealed by a professional engineer, and used the plans to construct the new apartment structure.

The plaintiff discovered this after the new complex was completed, and requested payment from Empire and Belmont for using the plans. When they refused to pay, the plaintiff—for the first time—placed notice of its copyright on the original plans, and filed for and obtained copyright registration.

The designers then took legal action against Empire and Belmont for copyright infringement. In a lengthy decision, the court ruled that there had indeed been a copyright infringement, and awarded damages to the plaintiff.

The defendants first argued that the plans prepared by the plaintiff were a "Work Made for Hire," and thus the property of the defendants. Under this doctrine, found in §201(b) of the Copyright Act, work performed by an employee within the scope of his or her employment is deemed to be owned by the employer.

The district court rejected this argument on the basis that the plaintiff was not an employee of the defendants but rather, as a professional, was an independent contractor. Under the 1976 Copyright Act, independent contractors are to be treated as employees under the work-made-for-hire doctrine only for certain categories of work, and only if the parties agree in writing that the work is to be considered one for hire. Because neither condition was met, the defendants could not be considered owners of the copyright under this principle.

The defendants next asserted that, because they contributed to the plans, they co-owned the copyright. While the court acknowledged that the defendants contributed ideas and changes to the plans, it found that their involvement was what one would ordinarily expect from a client in the preparation of architectural plans. The defendants' small contribution did not earn them joint authorship.

Further, the court found that the defendants never intended their design to be merged with the plain-

tiff's work into one integrated unit, which is a requirement for coauthorship status under the Copyright Act.

The court also struck down the defendants' argument that they were innocent infringers and that use of the drawings was a "fair use." The court did not believe that the defendants were misled by the lack of copyright notice on the drawings, since they were fully aware that the drawings were generated for parcel III only.

Invoices from the designers requested payment on an hourly basis for their architectural and engineering services, and they retained the original plans, simply providing the defendants with blueprints. The court construed these facts as an agreement by the parties to pay for architectural services, not for the plans themselves. The unauthorized use of these plans for parcel II could not be considered a fair use, since this was a commercial use that destroyed the plaintiff's only potential market.

As is apparent from the Aitken case, developers face many pitfalls when they revise and reuse contract documents. It's wise to address this issue directly in the contract between the developer and architect/engineer. If it's not addressed there, make an effort to check with a lawyer before reusing a set of plans. ■

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