

Copyrighting Your Design

by Quenda Behler Story

Here's a scenario unfortunately all too familiar to many small construction companies. Small Time Contractors, Inc., gets a call from Johnnie Jumper, a homeowner who loves the deck Small Time added to the neighbor's house and really, really, really wants them to come over and look at a project.

Johnnie Jumper would like Small Time's bid on a very special deck he has in mind, one that winds around the fish pond where his world-famous collection of fancy Japanese koi reside. This will allow him to show off the fish to all of his friends. And, of course, his friends are sure to want decks on their homes. Oh, and by the way, could Small Time design the deck, too?

Johnnie J. seems like such a nice guy that Jim, owner of Small Time Contractors, Inc., proceeds with the project, spending hours designing the ultimate fish-friendly deck for him, and presents the plans and specs to Johnnie along with a \$15,000 bid.

Guess What Happens Next

Johnnie Jumper then takes Small Time Contractors' plans, specs, and bid and shops them around to other contractors, asking for their bids on this special project. Itty-Bitty Builders takes a look at Small Time's plans and specs (and bid) and comes back to Johnnie J. with a cost of \$14,000. What a surprise! Johnnie jumps.

Recourse Is Possible

Does Small Time have any possible relief here, besides sneaking over and letting the water out of Johnnie's fish pond? The answer is a qualified maybe. It depends on what Jim did before he presented the plans and specs.

There are actually two distinct legal defenses in this situation: copyright

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Figure 1. Including a sample copyright notice on your finished plans will help deter your client from shopping your bid around.

laws protect the plans, and trade secrets laws may protect the specs.

Copyright laws offer protection. It used to be an iffy proposition to try to copyright buildings or building plans. In fact, there was a considerable body of law that said it wasn't possible. The thinking was that there simply wasn't enough difference between buildings to warrant copyright protection. In other words, if you've seen one bungalow, you've seen them all.

In 1990, however, amendments to the federal copyright laws tried to put that argument to rest. Yes, the amendments declared, building plans and buildings could be copyrighted after all. And you don't actually have to do anything special to copyright them. Your buildings and your architectural plans are automatically copyrighted as soon as you complete them, unless (there's always an "unless" in the law) the plans aren't in their final form, or unless they are in the public domain, which means anyone can use them.

Limits to copyright. Your preliminary designs are not protected by copyright, even if you mark them so, because they are not finished. And you can't copyright things like "bungalow," because bungalow design and style is considered

common knowledge. It is in the public domain. You could copyright the plans to your particular "Bungalow Cottage" but not the name or the design concept of "bungalow" or "cottage."

You also cannot copyright "universal" building elements contained in your plan. For example, you cannot copyright the way you assemble your plumbing stacks, because there's nothing unique about them. Likewise, you can't copyright your window and door openings.

How to Ensure Protection

Even though Jim doesn't *have* to do anything special for his plans to be copyrighted, there are some things he *should* do to protect that copyright. First of all, he should put a copyright notice on his plans (see Figure 1). This will eliminate Johnnie J.'s defense that he didn't know the plans weren't in the public domain.

Small Time could also register the copyright with the U.S. Copyright Office, which is easy to do. (You have to fill out Form VA and pay a \$30 fee. The form is available by calling the U.S. Copyright Office at 202/707-3000 or from their website www.loc.gov/copyright/forms.) Registration would allow Small Time to sue Johnnie J. as well as Itty-Bitty for copyright infringement without being limited by the market value of the plans. This is an important point: If the plans are registered, Small Time can sue for \$100,000 in punitive damages, as well as their attorney fees. If they are not registered, Small Time can sue only for actual damages, generally equal to the "true market value" of the plans. Realistically, this is probably not enough money to be worth suing for.

Specifications as Trade Secrets

The specifications that Small Time submitted along with the deck plans

The specifications that are included with this bid are protected under the trade secrets laws, and may not be released to any third party without the specific, written permission of Small Time Contractors, Inc.

Figure 2. If job specifications contain a trade secrets notice, clients may think twice before taking them to another contractor for a bid.

present a different problem. They are not covered under copyright law, but Jim may be able to protect them under the trade secrets laws.

In order to do that, he needs to prove two things. First, he must show that these trade secrets are indeed different from what isn't a secret. By definition, a trade secret is a method of doing something in a way that competitors are not. Second, Small Time has to make the effort to protect his secrets. For example, before presenting the bid, he could have persuaded Johnnie J. to agree in writing not to release his specs, thereby recognizing Small Time's specs as trade secrets.

There might be some hope for Small Time here. For example, suppose Jim came up with a deck building system

that prevented any contaminated rain runoff from draining into the fish pond. This might be unique enough to be entitled to trade secrets protection. Or perhaps he came up with a unique way of hanging the deck joists without using metal connectors that could also be considered a trade secret.

Even if Small Time could not successfully use the trade secrets law, simply putting the notice on the specs may still be enough to intimidate Johnnie J. into not using those specs to solicit other bids. 

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