

Building Plans and Designs – a Legal Perspective

by Katherine Hawes, Aquarius Lawyers

In recent years, there appears to be an increasing trend of requests for release of drawings, designs and plans to clients. Consequently, professionals may ponder the implications of releasing such works, both from a legal, and insurance, perspective.

In this article, I will provide an introduction to designers' rights and how they can be protected.

Copyright

The Copyright Act 1968 (Cth) (the Act) affords Australians intellectual property (IP) protection for, amongst other things, architectural works. This includes both hand drawn and computer created designs.

The Act provides copyright owners with automatic protection when an original work is created i.e. drawn or created electronically, and bestows exclusive rights to use their own works by reproduction, publication and by making it generally available.

Copyright owners will be the person who created the work. However, there may also be contracted agreements in place in circumstances where an employer owns the copyright, or the copyright has been assigned to a client and then licensed back to the designer.

However, there can also be what is known as an implied licence for another person to use the copyrighted works. For example: Unless stated otherwise, a client who has commissioned design works will have an implied licence to use those works for the purpose for which it was commissioned. This will be the case, even where the client may not have paid for the works.

Where the implied licence is invoked, a client may still be able to use the works to complete the construction. However, unless previously agreed, an implied licence would generally only enable the client to use the works once.

The effect of an implied licence can be by the parties entering an agreement, which includes a term which provides that any licence will cease if the client does not pay for the professional design services and thus terminates the agreement.

Insurance

As the designer (or employer of the designer) owns the copyright in works, they also have IP protection. Works include hand drawn, and CAD, drawings, designs and plans.

Generally personal or corporate policy, will dictate whether works are released upon receipt of a request from a client. If works have been requested to be released, then consideration should be given to whether the works also contain notes that may not be suitable for release; whether any other parties have had involvement in the works and of any rights that those parties may have; and whether there are any risk management issues involved.

It is recommended that the terms of any agreement with clients should clarify that IP is retained by the designer. An agreement should also stipulate whether the designer or firm is prepared to release works and if so, under what terms and conditions, and at what cost.

Many firms use a disclaimer, signed by the client, in an attempt to minimise liability, however it should be remembered that this only extends to the client signing the disclaimer. As well, certain pieces of legislation may not permit the terms and conditions in disclaimers to take effect, or

may water them down to some extent.

Disclaimers used for this purpose should be prepared by qualified lawyers to ensure maximum protection. It is also recommended that when works are being released, then only to do so by secure digital document solutions such as a PDF copy.

To ensure appropriate protection is given to drawings, designs and plans, it is recommended that consideration be given to the parties entering into a written agreement which outlines each party's obligations. This should include copyright, implied licences, disclaimers and the release of files as well as other important legal contractual matters.

With over 20 years' legal and business experience, Katherine Hawes is the founder and principle solicitor of Aquarius Lawyers. Through an arrangement with the BDAV, she provides complementary legal advice to BDAV Members for a 20-minute consultation, upon request. Anything longer is on a 'user-pays' arrangement. To access this service, please email the BDAV at info@bdav.org.au. ■



Katherine Hawes

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