

PB-17 COPYRIGHT AND INTELLECTUAL PROPERTY

SUMMARY

This Practice Bulletin provides advice and guidelines from the Alberta Association of Architects (AAA) that its members can present to clients or other groups in connection with a recommended standard of care for copyright protection and management, distribution and sharing of electronic documents. Its intent is to increase awareness around copyright and intellectual property issues in the digital world. This Practice Bulletin supplements the *2009 RAIC Canadian Handbook of Practice (CHOP)* and the 2010 Architecture Canada Practice Builder entitled *The Exchange and Transfer of Electronic Documents*. Members should also be familiar with these manuals that contain more information and Licence Agreements recommended in this bulletin.

Given the desire to reduce paper consumption combined with the sheer convenience associated with electronic transfer of information, architects and licensed interior designers are commonly asked and are sometimes under pressure by their clients and third parties including project managers, contractors, even other design professionals to provide electronic files of their drawings and specifications (including their original electronic source materials for active and inactive projects) for a variety of reasons. This raises concerns about unauthorized use of their work products and protection of intellectual property, copyright infringement and increased liability as a result of the information transfer.

BACKGROUND

A client or developer may request electronic documents for proposals to post for bidding purposes as a record for use in facility management for future renovations and additions to their building for tenant improvements or building alterations.

A contractor may request electronic documents for bidding purposes and/or distribution to sub trades for preparation of shop drawings for preparation of record drawings.

Another architect or licensed interior designer may request electronic documents as successor to a project with the same or a different owner / developer for a project that is partially completed in design for a project that is partially completed in construction.

A municipality and/or **Authority Having Jurisdiction** may request electronic documents for the permit application process for Building Code review.

Architects or licensed interior designers typically share electronic information: with their project consulting teams; with their clients for reference; with their colleagues in the professions; and with the public for publication.

BIM (Building Information Modelling) technology now makes it essential that electronic files be shared. Its 3D parametric nature and whole building systems approach to the integrated design process presupposes architectural and other related disciplines use similar if not the exact same software.

This level of integration, where an action by one party directly impacts all other parties in the preparation of documents, combined with its usefulness as a tool for coordination of engineering, fabrication, construction activities and building management, adds another layer of complexity to the issue of electronic information exchange.

THE ISSUE

The increasingly casual notion of the Internet as a “free domain” creates serious challenges to the rights of the professions to control copying and distribution of their intellectual property, particularly materials produced in digital form. Freedom in this context means the ability to use the creative works of others without asking permission or paying the rights holder due consideration. Digital technology makes unauthorized copying of material protected by copyright fast and easy. This is one reason why it no longer seems unusual to third parties, to request digital material, from drawings to photographs to presentations to contract documents, when so much information of almost any kind is now readily accessible.

Knowing how the copyright law protects architects and licensed interior designers will inform the membership when placed in a position to determine whether there is impending risk to one’s practice when requested to share or relinquish files in the digital environment.

COPYRIGHT, INTELLECTUAL PROPERTY AND MORAL RIGHTS

Copyright in Canada is covered under the federal *Copyright Act*. As a federal statute, this applies across the country. Under copyright law, unless there is permission or a licence from the owner of the copyright, it is illegal to copy, reproduce, publish, or transmit copyright protected material. This is as much the law in the digital world as it is in the print world.

BIM as described under Section 2.3.7 of the *CHOP* manual presents unique challenges for the profession including the development of new internal office protocols, the ‘ownership’ of the model and the need for new forms of agreement.

Architects’ and licensed interior designers’ rights are specifically defined in the *Copyright Act* as artistic works to which copyright applies. Copyright grants the author control over when, where, by whom and at what cost if any, their creations can be used, including the right to first time publishing.

Copyright Act Definitions:

“architectural work”	“architectural work” means any building or structure or any model of a building or structure;
“architectural work of art”	“architectural work of art” [Repealed, 1993, c. 44, s. 53]
“artistic work”	“artistic work” includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works;

As the authors of an architectural work, architects, architectural firms or licensed interior designers own the copyright of the designs, sketches, models, drawings, specifications and other information used to create a body of work. These are called “instruments of service”. Copyright is established when the work is first created and there is no legal need to register a copyright on the instruments of service for them to be protected by copyright.

Architects and licensed interior designers also enjoy a moral right as the creator of the work. There is nothing in the RAIC No.6 *Canadian Standard Form of Contract* that addresses moral rights, but they nevertheless exist. Moral rights are intended to prevent unauthorized changes or distortions from being made to the work, even if the copyright has been assigned or a licence for the use of the documents is in place. Intellectual property is the creative work and can range from innovative designs to proprietary CADD standards, trademarks, drawing conventions or details.

When a client engages an architect to design a building for a specific site, the architect permits the client under the client / architect agreement to use the architect’s instruments of service for that project only.

In effect, this arrangement forms a licence agreement that allows the client to use the design, drawings, specifications, etc., for the construction of the project. Similarly, contractors are granted a licence, or the right to use the architect’s instruments of service for construction purposes subject to the terms of the owner / contractor agreement.

THE RIGHT TO CONTROL COPYING

If permission or a licence agreement must be obtained by a client to use the architect’s instruments of service, and if contractors or trades must also enter into a licence agreement to obtain and use the architect’s same instruments of service, it follows that a separate licence agreement should be required for use of the instruments of service by any party for any other reason. The author, by extension, would retain the right under the *Copyright Act* to control whether or not he or she is even willing to do so.

Using the architect’s or licensed interior designer’s instruments of service without permission is an infringement of the *Copyright Act*. Enforcement of a copyright is the right and responsibility of the copyright holder.

In the case of architects and licensed interior designers, this is normally done by attaching a notice of copyright to their documents. Unless the architect specifically grants permission for other uses, or transfers or assigns ownership of the copyright to others, its rights always remain protected under the *Copyright Act*.

The AAA takes the position that architects and licensed interior designers should avoid the assignment of copyright to others. There is seldom a need for a client to obtain the copyright or intellectual property rights provided the client may use and reproduce the deliverables for the purposes of the project.

The AAA nevertheless acknowledges that some clients request exclusive copyright ownership of the architect’s or licensed interior designer’s instruments of service. Government and institutional clients, particularly those involved with secure or sensitive facilities or constructions often request

copyright ownership and the architect must assess whether or not this assignment would result in a real or perceived infringement of their rights.

In the event that copyright is assigned under contract or it is otherwise agreed to provide a license to authorize some specific reuse of work products by the member, the Association advises that additional protection against unwanted liability is required.

The agreement should include a provision that protects against unauthorized use of the documents and unauthorized changes to the design. In return for granting a license or for ownership, the client should also be prepared to indemnify the member against such unauthorized use. The following is one suggested disclaimer that addresses the issue and which should be reviewed by legal counsel as part of finalizing an agreement:

The client agrees to the fullest extent permitted by law, to indemnify and hold harmless the consultant from any damages, liabilities or costs including legal fees arising out of the use or modification by the client to any reports, plans, specifications, or other construction documents prepared by the consultant unless such use or modifications are approved in writing by the consultant and / or its subconsultants. This indemnification shall survive the termination of this agreement.

NOTES

References

Copyright Act (R.S.C., 1985, c. C-42)

This practice bulletin should be read in conjunction with Practice Bulletin PB-31 – Release of Electronic Documents.

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