

Copyright in the Digital Age

By: Project Administration Resource Committee

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The use of an architect's documents without permission from the architect (author) is a copyright infringement relating to the unauthorized use and / or reproduction of an “*artistic work*”, as defined by the copyright act;

The Copyright Act tells us that copyright subsists in every original literary, dramatic, musical and artistic work. The term “artistic work” includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, and architectural works. The term **architectural works**, means any building or structure or any model of a building or structure.

Copyright in works

3(1) For the purposes of the Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.

The OAA 600-2013, Standard Form of Contract for Architects Services, refers to the documents that have been produced by the architect, including electronic documents, as “*instruments of service*” and provides conditions for copyright, included in the following definitions;

Instruments of Service: are the paper or non-editable Electronic Documents which comprise the design, drawings, specifications and reports prepared by or on behalf of the Architect or Consultant, including but not limited to plans, sketches, drawings, graphic representations and specifications and materials which are prepared for the approval of the Client and the authorities having jurisdiction and

for construction, but do not include software systems, databases, computer programs, or computer-aided design documents (e.g. CAD or BIM – editable files) unless otherwise agreed in writing.

Electronic Documents are one of the formats in which Instruments of Service may be provided by the Architect. Electronic Documents refer to portable document files (PDF - non-editable) but do not include computer-aided design documents (e.g. CAD or BIM – editable files) unless otherwise agreed in writing.

OAA 600-2013 has language in GC 7.1 to explain to the client or any other person, the intent of the copyright of the architects instruments of service;

COPYRIGHT AND USE OF DOCUMENTS Copyright for the Architect's Instruments of Service belongs to the Architect. The Architect's Instruments of Service shall remain the property of the Architect whether the Project for which they are made is executed or not, and whether or not the Architect has been paid for the services. Alteration of the Architect's Instruments of Service by the Client or any other person is prohibited without a written license from the Architect.

Architect's need to be aware when their electronic documents are being used by others and the purpose for which they are being used. The provision to have an individual sign an authorization or waiver when they are requesting to utilize another author's electronic documents is the right of the author that has prepared the documents and it is recommended practice to request an agreement / waiver in order to protect the author's instruments of service and copyright, to restrict how the documents are to be used, and to protect the author from any liability from someone else's reliance on the accuracy of the electronic documents.

It should also be understood that an author has the right to impose a fee for an individual wanting to obtain use of the authors intellectual property (*including the use of digital files*) in order to compensate the author for the time and effort put forward in producing the documents and the inherent cost savings that the individual that is requesting to access to the documents will be gaining. This is not unlike the requirement to pay a fee for use of CCDC documents or for computer software. An individual deciding not to use an author's electronic documents because of a fee being requested as part of their use, doesn't recognize the value of the documents nor the right of the author to protect their copyright and their document from un-authorized use or reproduction.

Today we are faced with new challenges surrounding the copyright of digital files used in "**building information modelling**" (BIM). These files are being shared amongst multiple firms and disciplines on the design team, each contributing information to the file. From a copyright perspective, the *Construction Management Guide* website provides some interesting commentary on the matter. On their website, *cmguide.org*, they put forward two positions with respect to two underlying questions; "who owns the copyright", and "who is responsible for the design."

On the first question of "*who owns the copyright*" there would need to be joint ownership of the copyright where any party wanting to copy or make use of the BIM model or documents produced from the model, would require consent from each of the joint owners. With respect to the design that each discipline contributes to the model (*architectural, structural, mechanical, electrical, etc.*), each discipline would hold copyright of their respective designs. This would mean that if any one of the joint owners wanted to use a part of the BIM model, they themselves would require permission from the respective joint owner(s) whose design is protected by their copyright.

The question of "*responsibility for design*" becomes important when the model or documents produced from the model are provided to a third party. Liability becomes the important issue when someone else is given permission to copy or use the model or documents produced from the model. As with any individual copyright, a waiver or agreement would need to be utilized which would restrict the use of the model or documents and release the author(s) from liability. Each discipline needs to be liable for their respective design, however – jointly, it would make sense to enter into an agreement amongst all parties where the contributors to the model and documents produced from the model for the purpose of construction, including the Owner, waive liability against one another.

The RAIC Practice Builder 19 *“The Exchange and Transfer of Electronic Documents”* contains a sample *Standard Licence Agreement* within the Appendix that would be utilized for the sharing of electronic documents. Members should review the sample wording with legal counsel to ensure that it appropriately addresses the specifics of the contractual arrangements for a project and that it reflects any developments in case law.

A disclaimer or waiver for the sharing of documents produced from the model would be similar to other disclaimers used for the sharing of documents, as discussed within the content of this article.

Additional Information

Additional documentation can be found on these matters on the OAA and RAIC websites. Refer also to:

RAIC Practice Builder 19 “The Exchange and Transfer of Electronic Documents”

Canadian Handbook of Practice, Chapter 2.3.7. Appendix-A, “Digital Copyright and Architects”

OAA Regulatory Notice R.3, “When a Client Changes Architects”

These articles do not represent OAA policy or guidance but rather are based on the opinions and experiences of members of the OAA and are prepared for the benefit of the profession at large.
