



GUEST ESSAYS

Does Your Dog Bite? The Risks of Adopting a Project from the Pound

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When you go to the pound for a dog, you have no indication of owner history, house training or temperament. Was he given up because he bit the kids, because he soiled the rug or because his owner died? The same is true when you step into a project started by someone else. If your client presents you with incomplete plans, specifications or CAD files, find out who prepared them and the circumstances of their state of completion. Did the prior architect bite the kids, soil the rug or die? Was the prior architect paid for his work? Does your client own what he is giving you? The answers to these questions will tell you whether you are adopting Lassie or Cujo.

A client comes to you with some floor plan sketches and a photograph of a house. Can you design a house like this? You do so, collect \$2,500 for the plans and are promptly sued by a home builder, who claims that you copied his floor plan and exterior elevations. The deductible on your professional liability policy is \$5,000, meaning that regardless of result, the project cost you \$2,500, plus a great deal of time and aggravation dealing with lawyers, expert witnesses and depositions.

A client comes to you with partially complete Design Development drawings for a restaurant. Some of the drawings identify another architect, state that they are copyrighted, and admonish that they may not be reproduced without permission. Your new client explains that their prior architect refused to accommodate their program needs and that they have decided to part ways. Was the prior architect paid? Well, "we are still working out the details," the client responds sheepishly. To avoid any misunderstandings, you insist on being provided with a release from the prior architect before starting work. You also include a statement in your contract by which the owner warrants its ownership of the plans, and promises to indemnify you from the prior architect's claims.

The prior architect declines to provide a release, but you decide to rely on the client's promise of indemnification. The prior architect sues both you and the client, seeking damages, attorneys' fees and your head on a stick (he reports you to the state licensing authorities). Your professional liability insurance carrier agrees to provide a defense, but with a reservation of rights, and without providing any coverage or defense for the licensing authority investigation. The project stops dead in its tracks. You turn to your client for indemnification, but he claims to be short of funds. He has just enough to hire a bankruptcy lawyer to file a Chapter 7. The indemnification turns out to be worth exactly nothing.

Architects and engineers have found themselves defending lawsuits after taking on such projects. The former architect sues the client and the new architect, claiming copyright infringement, theft of trade secrets or unfair competition. The new architect must report the claim to its professional or commercial

liability insurers and the owner is sometimes prevented from proceeding with the project. State licensing authorities are sometimes alerted and those proceedings are generally not covered by insurance.

The Guard Dog

Since 1990, a/e's have been taught to think of copyrights as a guard dog, to be used to protect a/e's against theft of design services. There are excellent resources available on this site alone regarding your copyright rights (see Guest Essay, *Copyright and the Design Professional: An Overview* by Brian K. Stewart (www.aepronet.org/ge/no8.html) and Practice Notes, *The Architectural Works Copyright Protection Act of 1990* by Burton C. Allyn, IV (www.aepronet.org/pn/vol5-no2.html)). Filing a copyright registration is cheap, but litigation is expensive. Even if you have properly protected your copyrights by contract and with a registration, it could cost a fortune to litigate. You may be able to recover attorneys' fees at the end of your lawsuit, but someone must front the costs and fees until that time. Unless you are as wealthy as you are angry, filing a lawsuit may not be a good business decision.

But what about the defendants in your lawsuit? They have to buy dog food too, and will spend no less than you will. A/e's are learning that their guard dog occasionally turns on them, bites them on the leg or soils the carpet. Understanding how guard dogs are trained is critical to prevent being bitten.

Your Puppy Is Born

The federal copyright laws were amended in 1976 to account for changes in technology and commerce. Congress amended the Copyright Act again for architectural works created after December 1, 1990. The 1976 law protected plans and specifications. The 1990 amendments added protection for design expression in a completed building.

Cases involving architects and engineers have grown more frequent since 1990 and the body of a/e copyright law has developed accordingly. The law and cases interpreting it are intended to provide predictability in dealing with copyright ownership. Much of that predictability comes to light during the letter-writing and non-litigated phases of potential disputes. There, each side tames its respective dog and nobody goes home needing rabies shots.

When used in litigation, the law is dependent upon a hindsight analysis of the facts and is less predictable. The only certainty for such cases is that they are very expensive, time consuming and that they can leave large bite marks on all involved, including the "winner." Knowing in advance that any side of any dispute over design ownership should guide your actions from the beginning. Avoid the dispute at all costs.

House Training And Vaccinations

Does Your Design Bite? There is a funny scene in one of the Pink Panther movies. Peter Sellers sees a man with a dog. In an exaggerated accent, Sellers asks the man, "Does your dog bite?" The man answers, "No Monsieur." Peter Sellers bends down to pet the dog and it growls and bites him. "I thought that you said your dog does not bite!" Sellers exclaims. The man responds with "Oui Monsieur, but that is not my dog."

Owners frequently bring you sketches, concepts or partially complete plans claiming to have purchased the right to use them or to have created them in-house. Their design might not bite, but it may not be

their design. Maybe their prior architect died, was not licensed in your jurisdiction or maybe the owner just fired an architect and did not paid for the plans.

Preventing The Dog Bite. Communication is the best way to avoid most disputes, and this is no exception. If your client provides you with plans, specifications, floor plans or photographs of completed buildings, it is fair to ask of their origins. If there was a previous design professional, ask whether he was paid. Ask the client to obtain a release from the prior architect. If the client is evasive, contact the prior architect yourself. Ask whether he claims any right to the plans and whether he will provide you with a release. Have your lawyer prepare a release or have the prior architect write you a letter telling you that he has no objection to you proceeding with the balance of the project. Have your lawyer look at the letter to see that it means what you think it means. If the client or his prior architect will not provide a release, consider walking away (See the Topics of the Day article, [Clients From Hell](#)).

If you must have this project, at a minimum, add some specific contract language addressing the client's ownership of the drawings and obligation to indemnify you. Check with your lawyer for proper wording in your state, but use something along the lines of the following:

Client has provided Architect with drawings, specifications, construction documents, computer files and other materials prepared by ABC Architects or its employees. Client expressly warrants and represents to Architect that Client is the owner of all rights, title and interest in those materials, including the copyrights and all associated intellectual property, and that those materials have been provided to Architect consistently with Client's rights. To the fullest extent permitted by law, Client agrees to indemnify, defend and hold harmless the Architect, Architect's officers, directors, employees and agents from and against all claims, demands, damages, losses and expenses, including but not limited to attorneys' fees, expert witness fees and all expenses incurred by Architect of whatever nature, arising out of or relating in any way to the use, copyright, ownership, reproduction or modification of the ABC Architects work, including but not limited to any claims by ABC Architects, its officers, directors, employees or agents, or any other party claiming ownership of, rights to, copyrights or intellectual property rights in the ABC Architects work.

If you forgot to put language like this into your agreement in advance, or if you discover that a prior architect was involved later in the game, have your lawyer use language similar to the above to prepare a contract amendment to add these terms.

Finally, remember your obligations as a licensed professional. Your state's licensing laws require that you exercise independent professional expertise in your work, with penalties for everything from tax evasion to professional negligence. Penalties can include fines, suspension of your license and public humiliation. You may even need a separate lawyer to handle the licensing issues.

Cautiously guard your professional integrity and cast a skeptical eye on any client that declined to pay another design professional. With proper care, feeding and vaccinations, your dogs should not bite or soil your floor. *Bone appetit.*



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NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.