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ATTENTION BUSINESS OWNERS:

SO WHO REALLY OWNS THE DESIGN AND DESIGN DOCUMENTS FOR YOUR CONSTRUCTION PROJECT?

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Your new construction project is off to a great start. Site selection and assessment has cleared through all of the usual red tape. Your financial backers are committed. You even have a "hand-shake" deal with a new architect who comes highly recommended. This person has already provided you with some exciting concepts and a vision as to what your final project will look like. You can't wait to get started. Before that architect starts to put pencil to paper, however, have you done all that you can to make sure that you actually "own" the design and the design documents that the architect will be preparing for you?

Most construction professionals, including project owners and others who make their living building and managing construction projects, have a general sense that what architects do is "proprietary" and, in some way, "protectable." The services that are provided by an architect are characterized by certain "intellectual" efforts, those efforts resulting in the "authorship" of drawings, specifications, and other design documents prepared by the architect. Such authorship, under current Copyright Law, creates a presumption of ownership of those design documents by the architect. It also creates the same presumption as to the very design itself. This result hardly seems fair since, after all, there would be no design documents that the architect is being paid for if you, the project owner, had not secured financing for the project in the first instance.

Intellectual property consists of those rights that result from intellectual efforts expended by various persons in various fields of industrial, scientific and commercial endeavor, and includes copyrightable artistic creations, or "works." When the architect is a *bona fide* employee of the project owner, the works created by the staff architect inure to the benefit of the project owner under the "works made for hire" doctrine. In this scenario, the project owner has an unfettered right to do what it wants to with the design documents and the design because there is no question as to ownership of both. This is one exception to the previously-mentioned presumption of ownership.

However, when the relationship between project owner and the architect is one where the architect is hired as an independent contractor and has discretionary authority concerning design expediencies, the works for hire doctrine fails and the presumption of

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copyright ownership inures to the benefit of the architect. This does not mean that the project owner cannot build its project. It does mean that the project owner will need to properly license the copyright from the architect.

In this second scenario, the project owner and the architect should each insist on a properly formulated contract document that spells out the rights and responsibilities of each. That is, the project owner should protect against being forced to re-design with a new architect where there is a falling out between the project owner and the original architect. The architect should ask for similar provisions that would provide for suitable royalty for the license conveyed.

For more information about copyrights or protections for architectural works, please contact Joseph S. Heino at (414) 225-1452 or jheino@dkattorneys.com.

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