

HIA Members Ask

Copyright – Who owns the Design?

By David Gaffney Executive Director – Business Compliance



Copyright is a legal right that arises when an author produces original work. Building Plans are specifically referred to in the Copyright Act and the copying of those plans either by creating other plans or the construction of the building shown on those plans is a breach of copyright.

Drawings are also protected and so drawings that are copies or embedded in later designs may breach copyright.

Copyright can be dealt with in the same way as other forms of personal property. It can be assigned, licensed, given away, sold, left by will, or passed on according to the laws relating to intestacy or bankruptcy. It is always best to obtain written evidence of permission to use copyright, rather than rely on oral statements.

Ownership when produced by an employee

As a general rule, the copyright in a work which is created in the source of a person's employment will be the property of their employer.

If a dispute arises, for an employer to assert copyright, they will be required to demonstrate that:

- the worker is actually an employee not a contractor (you will need to look to "common law" factors like the control test, annual, sick and long service leave, fixed salary, superannuation contribution, deduction of PAYG, provision of tools etc); and
- that the work is created 'in pursuance of the terms of his or her employment', that is, the work is created within the scope of the contract of employment.

Ownership when produced by a contractor

Unless there is a written and signed agreement assigning copyright to the principal (or builder), an independent contractor will retain copyright in the work they produce. Despite this, commissioning a contractor to produce work will likely give rise to an implied licence to use that work produced.

Plans provided by a client

When an owner gives you plans to use you should always check to make sure that the owner owns those plans. If they have been made by another builder or contractor, you should ask for written proof that you are authorised to use the plans. If you do not have permission you may be in breach of that author's copyright.

Conclusion

Each case is unique and needs to be assessed on individual circumstances. Contracts of service and contracts for services should be checked to ensure they contain appropriately worded and clear assignment clauses.

For further assistance with your legal and contractual obligations call the HIA Workplace Services Team for assistance on the memberline 1300 650 620.