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# PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

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MSP PL 07/99: "Limiting CADD Liabilities/Part 2: Contractual and Ownership Issues"

July, 1999

## Limiting CADD Liabilities

### Part 2: Contractual and Ownership Issues

As covered in Part 1 of this two-part report, virtually every substantial design firm in North America uses computer-aided design and drafting (CADD) on its projects. Yet despite its advantages, the growth of CADD has been a mixed blessing for most design firms. While CADD increases productivity and enables firms to provide a wider range of services, it also poses new challenges – and liabilities.

Part 1 addressed the major areas of liabilities associated with CADD and provided practical remedies for minimizing the risks. In this issue, we will cover protections you can build into your client contracts that can further limit liabilities and, equally important, protect your rights of ownership.

#### Contractual Protection

There are several places in your standard service contracts where you can address CADD related issues – in the Scope of Services section outlining your deliverables, for example, or in the Ownership of Instruments or Services provisions that spell out your rights to your designs. Better yet, you can add a detailed CADD/Electronic Media clause to your contracts.

Here is an example of such a CADD clause. Consult with your attorney when drafting the specific language

needed to fit your circumstances.

#### Basic Delivery of CADD Files Clause

*In accepting and utilizing any drawings, reports and data on any form of electronic media generated and provided by the Consultant, the Client covenants and agrees that all such electronic files are instruments of service of the Consultant, who shall be deemed the author, and shall retain all common law, statutory law and other rights, including copyrights.*

*The Client agrees not to reuse these electronic files, in whole or in part, for any purpose or project other than the project that is the subject of this Agreement. The Client agrees not to transfer these electronic files to others without the prior written consent of the Consultant. The Client further agrees to waive all claims against the Consultant resulting in any way from any unauthorized changes or reuse of the electronic files for any other project by anyone other than the Consultant.*

*The Client and the Consultant agree that any electronic files prepared by either party shall conform to the software and*

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*hardware specifications listed in Exhibit \_\_\_\_\_. Any changes to the CADD specifications by either the Client or the Consultant are subject to review and acceptance by the other party. Additional efforts by the Consultant made necessary by a change to the CADD or other software specifications shall be compensated for as Additional Services.*

*The electronic files submitted by the Consultant to the Client are submitted for an acceptance period of \_\_\_\_ days. Any defects the Client discovers during this period will be reported to the Consultant and will be corrected as part of the Consultant's Basic Scope of Services. Correction of defects detected and reported after the acceptance period will be compensated for as Additional Services.*

*The Client is aware that significant differences may exist between the electronic files delivered and the respective construction documents due to addenda, change orders or other revisions. In the event of a conflict between the signed construction documents prepared by the Consultant and electronic files, the signed construction documents shall govern.*

*In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold the Consultant harmless from any damage, liability or cost, including reasonable attorneys' fees and costs of defense, arising from any changes made by anyone other than the Consultant or from any reuse of the electronic files without the prior written consent of the Consultant.*

*Under no circumstances shall delivery of the electronic files for use by the Client be deemed a sale by the Consultant, and the Consultant makes no warranties, either express or implied, of merchantability and fitness for any particular purpose. In no event shall the Consultant be liable for any loss of profit or any consequential damages.*

## Protecting electronic files from unauthorized modification

There is little you can do to protect your electronic files from unauthorized modification once they are delivered to another party. Because of this, many design professionals and environmental consultants remove their electronic seals and signatures and any mention of their firm (title blocks, logos, proprietary symbols and other identifying marks) from every electronic file before transmission to the client or anyone else.

# Copyright Basics

Prior to 1990, design professionals had only limited protection under copyright laws. Copyright law defines "architectural work" as the design of a building as expressed in plans or drawings, but not individual standard features.

The owner of a copyright to an architectural work has the exclusive right to reproduce it, to make derivative works from it, to grant licenses to use the work, to sell the work and to otherwise deal with the copyright. In general these rights last throughout the life of the owner and extend 50 years beyond that.

While the engineering plans or drawings for a building design could be protected, the building design itself could not. However, the 1990 Architectural Works Copyright Protection Act amended the U.S. copyright laws to provide more extensive safeguards for the designs of architects and engineers. The Act prohibits unauthorized construction of buildings depicted in copyrighted drawings created on or after December 1, 1990.

So, in addition to the fact that an architect's or engineer's drawings are copyrighted as they are created, now, for the most part, the buildings are too. The Act applies generally to architectural works intended for human use or occupancy. Housing, churches or commercial structures are copyrighted, for instance, but not roads, dams or bridges.

Although your rights of ownership are protected by legislation as soon as you create your drawing or design, it is up to you to safeguard them. It is a simple matter to sign away all these valuable protections contractually with a stroke of a pen.

If you intend to protect your full ownership rights, your client contract should clearly state that you will retain the copyrights to your drawings and design, as well as the ownership of these documents.

Consider the following contract language:

### Sample Ownership of Instruments of Service Clause

*All reports, plans, specifications, computer files, field data, notes and other documents and instruments prepared by the Consultant as instruments of service shall remain the property of the Consultant.*

*The Consultant shall retain all common law, statutory and other reserved rights, including the copyright thereto. ✦*

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cedures that log the transmission of data to and from your client. Keep hard copies of everything that is transmitted.

In spite of all your efforts, should your client insist on ownership of your documents in electronic form, tie the transfer of ownership to receipt of final payment of your fees – just as you should for hard copy.

In this case, your contract should definitely refer to such materials as instruments of your service and disavow any warranty of merchantability and fitness for any particular purpose. Again, insist on a strong waiver and indemnity for unauthorized changes and reuse of the data. Consider using the contract clause shown above, substituting the opening paragraph below for the original first two paragraphs.

#### Delivery of CADD Files – CADD Modification Clause

*The Client acknowledges the Consultant's plans and specifications, including all documents on electronic media, as instruments of professional service. Nevertheless, the plans and specifications prepared under this Agreement shall become the property of the Client upon completion of the services and payment in full of the moneys due to the Consultant.*

*The Client shall not reuse or make or permit to be made any modifications to the plans and specifications without the prior written authorization of the Consultant. The Client agrees to waive any claim against the Consultant arising from any unauthorized reuse or modification of the plans and specifications.*

## Letter of Agreement with Contractors

If you should be required to provide your electronic files directly to contractors for their use in preparing shop drawings, protect yourself with a strongly worded letter of agreement. In light of the added risk, you should also demand an appropriate fee. The following letter includes sample language you and your attorney can adapt for use.

#### Sample Letter of Agreement

*Dear {Contractor's name}*

*At your request, ABC engineering (ABC) will provide electronic files for your convenience and use*

*in the preparation of shop drawings related to {name of project}, subject to the following terms and conditions:*

*ABC's electronic files are compatible with {insert software/hardware specifications}. ABC makes no representation as to the compatibility of these files with your hardware or your software beyond the specified release of the referenced specifications.*

*Date contained on these electronic files is part of ABC's instruments of service and shall not be used by you or anyone else receiving this data through or from you for any purpose other than as a convenience in the preparation of shop drawings for the referenced project. Any other use or reuse by you or by others will be at your sole risk and without liability or legal exposure to ABC. You agree to make no claim and hereby waive, to the fullest extent permitted by law, any claim or cause of action of any nature against ABC, its officers, directors, employees, agents or subconsultants which may arise out of or in connection with your use of the electronic files.*

*Furthermore, you shall, to the fullest extent permitted by law, indemnify and hold harmless ABC from all claims, damages, losses and expenses, including attorney's fees arising out of or resulting from your use of these electronic files.*

*These electronic files are not contract documents. Significant differences may exist between these electronic files and corresponding hard copy contract documents due to addenda, change orders or other revisions. ABC makes no representation regarding the accuracy or completeness of the electronic files you receive. In the event that a conflict arises between the signed documents prepared by ABC and electronic files, the signed contract document shall govern. You are responsible for determining if any conflict exists. By your use of these electronic files, you are not relieved of your duty to fully comply with the contract documents, including and without limitation, the need to check, confirm and coordinate all dimensions and details, take field measurements, verify field conditions and coordinate your work with that of other contractors for the project.*

*Because of the potential that the information presented on the electronic files can be modified, unintentionally or otherwise, ABC reserves the right to remove all indicia of its ownership and/or involvement for each electronic display.*

*ABC will furnish you electronic files of the following drawing sheets: {list here.}*

*A service fee of \$\_\_\_ per sheet shall be remitted*

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to ABC prior to delivery of the electronic files.

*Under no circumstances shall delivery of the electronic files for use by you be deemed a sale by ABC, and ABC makes no warranties, either expressed or implied, of merchantability and fitness for any particular purpose. In no event shall ABC be liable for any loss of profit or any consequential damages.*

## Final Points

If your client or others are to provide information to you electronically, be very clear about hardware and software specifications, the scope of the information on disk, who is responsible for the content and condition of the disks, as well as the source of the data. These are matters to be discussed and negotiated with your client.

If the client is to be responsible, you can modify your Information Provided by Others contract provision to include electronic files. If you have the responsibility, you need to consider the time and cost required to verify the information received when you are determining your fee.

To minimize your liability for commercial software-related problems, you must be able to show that you exercised the proper care in researching, selecting, testing, training and using your software and databases.

If you have documented such steps, a court

may find that you performed within the standard of care even though there was a failure because of defects in the software. Therefore, thoroughly investigate any new software package before you buy it. Make sure it's applicable to the kinds of projects your firm undertakes, and negotiate with your software vendors for appropriate contractual assurance and training support.

In general, rely on time-tested software you have thoroughly checked in-house against a design with a known result. Insist that your staff be thoroughly trained. Make sure an experienced staff member checks any work produced by computer before incorporating it into the design or report.

## May We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures.

Please feel free to call on us for assistance. ✦

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*Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

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