What Every Architect Should Know About Copyright Law

Practice Matters

By Richard M. McDermott and Jason M. Sneed

As digital cameras, copy machines, and cheap scanners have proliferated, it has become harder than ever for architects to prevent unauthorized copying of their work. And the ease with which material can be downloaded from the Internet seems to have made people more disrespectful than ever of laws intended to protect intellectual property. It is imperative that architects know what their rights and legal remedies are should they discover that people are using their work without permission.

Copyright law basics

Here's a review of the basics. Certain rights are granted to anyone who creates an original work of authorship and fixes it in a tangible medium of expression, like a drawing, photograph, CAD file, Web page, or even an actual building. The first of these rights is the exclusive right to reproduce the work. The second is the right to use the work to prepare similar works, also called "derivative works." The third is the right to distribute copies of the work to the public—by sale, license, rental, lease, or assignment. Only the creators of an architectural plan or elevation, for example, or those employed by them, have the right to make copies of the work or to make other plans based on the original.

No one else can sell or license the right to build anything based on the floor plan or design, or build the structure itself without the creators' permission. Copyright rights can cover other things, such as the performance of a musical composition, but these seldom apply to architects or architecture.

It is also worthwhile to point out that copyrights are not patents. Patents can protect inventions, a new machine or manufacturing processes, the visual ornamental characteristics of an article of manufacture, even genetically engineered plants. A copyright can protect your buildings from being copied, but it can't keep someone from copying concepts or ideas.

One common misunderstanding is that original works of authorship are not protected until they are registered with the U.S. Copyright Office. Actually, all kinds of works—a building, a song, a novel—are protected as soon as they are fixed in a tangible medium of expression. But no legal action can be brought against an infringer until copyright registration has been obtained. Because getting a copyright normally takes four to six months, it is prudent to register your design work as soon as it is created, rather than waiting until there is an urgent need to enforce your rights.

Early copyright registration also enhances the copyright owner's remedies in the event that the work is infringed upon. If the creator of a work sought registration within three months of the work's creation, regardless of whether an infringement took place before registration, he may collect statutory damages. This is important, because often an infringer will claim that because a project built from copied drawings was not profitable, the copyright owner did not suffer a loss. But copyright owners who are entitled to statutory damages do not have to prove they suffered a loss in order to collect money from an infringer. Because the U.S. Copyright Office is a federal agency, all copyright cases are tried in federal court. Statutory damages are discretionary and are set by the judge trying the case. They can be as much as $30,000 per infringement, or up to $150,000 for each instance of willful infringement, which occurs when the infringer knew the work that he copied was copyrighted. Attorneys' fees may also be recoverable in some cases.

Another misperception is that one cannot copyright a building. In fact, you can. Since Congress passed the Architectural Works Copyright Protection Act in 1990, buildings themselves can be registered. Prior to 1990, anyone could reproduce buildings that looked identical to those created by others, as long as they did not use copied drawings to build them. Now, copyright owners can register completed buildings as well as drawings. According to the act, the "work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features" such as doors and windows. A building design doesn't have to be innovative to receive protection—in fact, the bar is very low as to what constitutes something worthy of being copyrighted—as long as the creation is original to the copyright registrant.

How to register your work

You can learn how to register your work, as well as many other things that apply to protecting architectural works, by getting U.S. Copyright Office Circular 41, found online at www.copyright.gov/circs/circ41.html. Architectural works are registered as works of visual art using Form VA. This is also available online from www.copyright.gov/forms/formvai.pdf.

The basic application fee is $30, but it costs more if the applicant wants to expedite registration. Since the copyright act now distinguishes between architectural plans and completed architectural works, the architect or builder should register plans of unbuilt work as well as structures created from their drawings that have been completed. When a finished structure is being registered, the drawings can be supported with interior and exterior photographs.

A copyright notice should be made in the following form: with the copyright symbol or the word *copyright*, the year of first publication of the work, and the name of the copyright owner or a name by which the owner can be recognized; for example, "© 2003 Smith & Jones Architects, Inc." The notice must be located in a conspicuous place on the documents. Effective use of

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copyright notices can limit the defenses that an "innocent infringer" is able to use to refute a claim of infringement or to minimize damages. The notice also tells a person who might want to use the work whom to contact to get a license.

An important difference between copyright and trademark law is that a trademark owner, such as the Coca-Cola Bottling Company, must vigorously protect the public's association with their trademark, *Coke*; otherwise, their rights to protection will be lost. A copyright owner is not required to send warning letters to, or worse, sue every infringer in order to retain their rights. A copyright owner might skip suing a contractor who copied a design once because the chances of recovery are small, but may later sue a large contractor who had copied it hundreds of times and against whom the chances of making a recovery are greater.

Who owns the copyright?

Some clients assume that because they paid an architect to design a structure, that they "own" the building's design. This not true unless the architect and client agree on this point up front. Your contract with a client should specify, first, that the architect is an independent contractor and not the client's employee. Second, unless you are selling the rights, the contract should reiterate that the architect owns all the copyrights for works created pursuant to the contract.

Third, it is advisable that the contract state that only when the works are completed, sealed, and the architect has been paid for all services complete to date, will the right to build a specified number of structures based on the plans or drawings be granted to the client. Clients who wish to build more than one structure based on a set of drawings can negotiate with the architect to build a set number of buildings or to buy the copyright altogether.

It is not uncommon for a client to hire an architect to design a building but then stop the work before it is complete. If the client later hires a builder to complete a structure from the preliminary drawings, the architect may be able to recover damages from the builder for infringement, and damages for breach of contract from the client, as well as contributory infringement. Contributory infringement means that the client induced the builder to commit the infringement. As part of those damages, the architect may be able to recover the revenues he or she would have received had the project gone to completion, plus attorneys' fees and costs.

Confusion about copyright ownership may also arise occasionally between architects and their employees. All employment agreements, whether made with permanent employees or temps, should clearly state that employees' work products are "works made for hire." This means that the employer owns the copyright rights to any work prepared by an employee within the scope of his or her employment. Information about work for hire laws is available in U.S. Copyright Office Circular 9, at www.copyright.gov/circs/circ9.html.

See you in court

The key inquiry in a copyright infringement action is, simply put, whether the defendant copied. Copying can be claimed in one of two ways: by showing direct copying, where there is evidence that the defendant made actual copies of the drawings; or by showing indirect copying, where, for example, a defendant could have measured a structure and redrawn it. Two elements are required to prove a work was copied. The first is that the accused infringer had access to it, and the second is that the copyrighted work and the allegedly copied work are "substantially similar."

This situation is not as straightforward as it sounds. If Architect Smith copyrighted a building design and a few weeks later Architect Jones independently created the same building design, Jones did not infringe.

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If a dispute between them arises, Smith has to prove that Jones had access to the Smith design and copied it. To defend himself, Jones must prove he created the work "independently," without access to the prior work. Whether the compared works are substantially similar is determined based on the perspective of an ordinary observer, not the perspective of one skilled in architecture. To further confuse matters, copyrights might have been granted to both architects for their similar designs. The copyright office does not check to see whether a design is truly one of a kind when deciding to grant a copyright. It only gives an item a cursory review to determine whether it meets the threshold of originality necessary to make it copyrightable.

If infringement can be proved, sometimes an out-of-court settlement between the parties can be negotiated. In addition to the amount of the settlement, those on opposite sides of the dispute have to agree on two things. First, they must decide what is to become of the allegedly infringing works. Often, infringing works, like drawings, are destroyed. In the case of a building, it is probably more practical for the parties to negotiate a settlement than to bulldoze. The second thing they must agree upon is whether the terms of the settlement should be kept confidential. The terms of most commercial litigation settlements are sealed, but it may be in the copyright owner's interest not to do so. If the terms are known, the information could be used to set a value for other settlements, and the size of the award may deter people from being tempted to infringe in the future.

Practical considerations

While a copyright mark may discourage some infringers, in the end there is little point in registering your buildings unless you are willing to take legal action against offenders, and it can be a good thing to have a reputation as one who is willing to take infringers to court. But before instigating a lawsuit, you need to be realistic about whether you can win your case. If you cannot prove that the infringer had access to the copyrighted work, and that the derived work is substantially similar to your own, it will be hard to win. Next you must consider cost. The fees for getting a simple copyright infringement case to trial can be in excess of $100,000. And because the copyright act permits the prevailing party to recover his or her attorneys' fees, a plaintiff who brings a weak case to court may wind up paying the defendant's legal bills.

If your intention is to use the aggressive prosecution of copyright infringements to create an income stream, discuss the feasibility of this goal with an attorney. The federal courts are busy, and getting a case to trial can take 18 to 24 months. Even before that, the amount of time it takes to prepare counsel for trial, make depositions, locate evidence, and participate in a trial may be far more than most people realize.

Sadly, architects who publish their works on the Internet are particluarly vulnerable to infringers. A person who once had to go to some trouble to copy a professional's work can now do it in seconds. If you don't want your work to be copied, it is probably best not to put in on the Internet. If your work is posted without your permission, you should consult an attorney who can help you consider your options. ■