

Copyright of Documents Prepared by Architects & Engineers

Design professionals have traditionally expressed their intellectual ideas in the form of design and construction documents. U.S. federal copyright law protects the creativity of architects and engineers for the drawings, specifications and other documents¹ that they have prepared from infringement of their rights of ownership. The U.S. Copyright Act protects “original works of authorship fixed in a tangible medium of expression.” By contrast, patent law is designed to protect tangible devices or processes, and is inapplicable to copyright law.

Copyright infringement is defined as an unauthorized violation of the exclusive rights of the copyright owner. Copying the architectural work by duplicating the original drawing or constructing a duplicate building from the original drawing or from the original building are examples of infringement. In most cases, the test is whether or not the average lay observer would recognize that the copy was taken from the original work.

However, the U.S. Court of Appeals, 6th Circuit, in *Kohus v. Mariol*, 66USPQ2d 1845 (2003) applied the legal test for “substantial similarity” to determine if the defendant’s engineering drawing regarding a movable structure amounted to copyright infringement. Ordinarily, when determining when two drawings are substantially similar, a jury would have to evaluate the similarity from the viewpoint of the ordinary observer. In the case of technical engineering documents, however, a lay person is unlikely to understand what constitutes infringement, and expert testimony should be allowed. The Court of Appeals therefore sent the *Kohus* case back to the District Court to retry the case allowing expert testimony.

Modernly, to prove there is an infringement of copyrighted material, a design professional must show that a duplication of their documents are substantially similar. Thus, someone would have to show that they had copied a design professional’s original expression. It is not sufficient to show the designs were merely alike. Also, if documents are created within the scope of employment, the work belongs to the employer as a “work made for hire.”

As an example of copyright infringement in the architectural context, the District Court of Minnesota refused to dismiss part of a design copyright infringement complaint in *U.S. Home Construction v. R.A. Kot Homes, Inc.*, 2007 WL 3037321 (D. Minn. 10/16/07). Plaintiff owned two copyright registrations for an architectural design of a house called the Remington. Defendant built a house that allegedly copied the design. Plaintiff filed a copyright infringement suit and sought damages including the harm to its reputation. The court cited several cases that have permitted copyright owners to recover damages for lost reputation. Note that the federal courts have exclusive jurisdiction to determine copyright infringement.

¹ These expressions of creativity include written reports, renderings, models, computer programs and other electronic documents.

Contract Clauses for Professional Agreements

It is advisable for design professionals to include a contract clause that protects their interests of copyright. As an example:

The Consultant and its sub-consultants shall be deemed the author and owner of its Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Consultant and its sub-consultants.²

Should a design professional decide to contract away their copyrights, they should consider adding additional protection, as follows:

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant and its sub-consultants from any damages, liabilities or costs, including reasonable attorneys' fees and costs of defense, arising out of the use or modification by the Client to any reports, plans, specifications or other construction documents prepared by the Consultant and its sub-consultants if such use or modification has not been explicitly approved in writing by the Consultant and its sub-consultants. This indemnification provision shall survive the termination of this Agreement.³

The Architectural Works Copyright Act of 1990

Prior to the 1990 Architectural Works Copyright Protection Act, a design professional's documents could be protected but not the built project. Therefore, someone could photograph the building or redraw the design. The Act covers buildings designed to be occupied by people, such as recreation centers, apartments, houses, office buildings and churches. Structures other than buildings such as highways, bridges and dams, and boats are not intended to be protected under the Act.

Additionally, ideas that are the subject to copyright may be protected, but not if they are considered standard details or features of a design. The Act does not protect individual standard features or components of a building, such as windows, doors, and other building components, nor standard configurations of spaces.

² Taken from AIA B101 (2007) Standard Form of Agreement Between Owner and Architect, Article 7.2

³ XL Insurance Contract Guide, p.137

Registration Not Required But Beneficial

A design professional need not register their documents with the U.S. Copyright Office in order to gain the protection of the 1990 Architectural Works Copyright Protection Act. However, registering the documents is *prima facie* evidence of such copyright. Furthermore, once the ideas are registered, the burden shifts to someone infringing the protected documents afforded under the law to prove the invalidity of the documents. Before an infringement claim can be filed a design professional should register their documents, and then once a claim is made, they may seek attorneys' fees and statutory damages.

Clients of architects and engineers need to understand that they may own the drawings but not own the copyright to the documents. However, design professionals may transfer ownership of the copyright in a printed document in order for the client to own the copyright.

How to Copyright Documents

To register documents, a form needs to be completed, along with the documents to be filed and a fee paid.⁴ In order for a design professional to indicate their copyright they should place a notice on their documents. For purposes of the notice, the word "copyright" or the letter "c" with a circle around it plus the year and the author's name or other identification recognizable to the public as identifying the firm may be used. The notice could be placed on the documents without registering with the U.S. Copyright Office. If a potential infringement occurs, the documents can be registered and a claim may be made by the design professional for their attorneys' fees and statutory damages.

Consult with an intellectual property attorney for any questions. In the meantime, review the information available on the U.S. Copyright Office web site at www.copyright.gov for additional information.

This information provided by Selvaggio, Teske + Associates. STA is dedicated to meeting the complex needs of today's design professionals. We are a one-stop resource for insurance and risk management services. For more information, contact Paula Selvaggio at 800-975-9468.

⁴ Photographs of a built project may also be submitted for copyright protection.