

# CONSTRUCTION LAW *Alert*

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## The 10 Things You Must Know About Architectural Copyrights

*by Jeff Reichard, Nexsen Pruet, LLC*

Some people say that imitation is the sincerest form of flattery. However, under architectural copyright law, imitation could be a very costly endeavor. Here are ten tips to help contractors, owners and architects protect themselves from architectural copyright disputes.

### 1. CONSTRUCTING A SUBSTANTIALLY SIMILAR BUILDING WITHOUT PERMISSION MAY INFRINGE THE COPYRIGHT OWNER'S RIGHTS.

In 1990, Congress passed the Architectural Works Copyright Protection Act which explicitly provides copyright protection to original designs of architecture in virtually any form, including architectural plans, drawings and buildings themselves. This means that a builder may be liable for copyright infringement if the building itself infringes another's plans or building regardless of whether the plans themselves were copied. Therefore, builders, architects and owners should not attempt to mimic other architectural works in any form.

### 2. MAKING MINOR CHANGES TO PLANS DOES NOT NECESSARILY AVOID COPYRIGHT INFRINGEMENT.

Courts usually apply one of two tests to determine whether an architectural work infringes a copyright owner's original work. Under each of these tests, the court will attempt to determine whether the alleged infringing work is "substantially similar" to the copyrighted work. Under the first test, often called the "total look and feel" test or "total concept and feel" test, the works are compared in their entireties by "ordinary observers" to determine whether they are substantially similar. Therefore, minor changes that do not change the total look and feel of the work may infringe a copyright owner's rights. Under the second test, often called the "filtration" test, the court filters out the unoriginal portions of the work before examining the original/protectable portions of the work to determine whether they are substantially similar. Under these tests, simply changing standard functional features, such as windows, doors or other staple building components is no defense to a copyright infringement claim.

### 3. INNOCENT INFRINGEMENT IS NOT A DEFENSE TO COPYRIGHT INFRINGEMENT.

To prevail in a copyright infringement lawsuit, a copyright owner does not have to show an intent to copy or even actual copying. Instead, the copyright owner merely needs to establish that the alleged infringer had access to the copyrighted work and the alleged infringing work is substantially similar to the copyrighted work. Consequently, a builder or

owner may be liable for copyright infringement even if they did not intentionally copy a protected architectural work.

#### 4. THE LACK OF A COPYRIGHT NOTICE MAY NOT PREVENT A SUCCESSFUL SUIT FOR COPYRIGHT INFRINGEMENT.

Although many individuals believe the "©" copyright notice is necessary for copyright protection, this is generally untrue. For works published after March 1, 1989, a copyright notice is not required to assert a copyright infringement lawsuit. Therefore, builders, architects and owners should assume that all architectural works are protected under copyright law regardless of whether the author includes a copyright notice.

#### 5. COPYRIGHT INFRINGEMENT CARRIES THE RISK OF ENHANCED DAMAGES, ATTORNEYS' FEES, AND COURT COSTS.

Under certain circumstances, the copyright owner may be entitled to receive statutory damages, attorneys' fees and court costs from an infringer. Statutory damages means that the copyright owner does not have to prove the amount of actual damages it suffered as a result of the infringement. Instead, the court may award up to \$150,000.00 per infringement. In other words, a builder might be liable to a copyright owner up to \$150,000.00 for each structure that infringes the copyright owner's rights. In addition to statutory damages, the court may require the infringer to pay court costs and the copyright owner's attorneys' fees.

#### 6. ARCHITECTS AND DESIGNERS SHOULD TIMELY REGISTER THEIR COPYRIGHTS TO OBTAIN ENHANCED REMEDIES AGAINST POTENTIAL INFRINGERS.

As stated in the previous section, statutory damages and attorneys' fees may be available to copyright owners who register their copyrights in a timely fashion. To receive these enhanced remedies, the owner's copyrights must be registered before the infringement is commenced by the infringer or, in the case of published works, within three (3) months of the first publication of the architectural work. Registering a copyright with the United States Copyright Office is simple, relatively inexpensive and even can be submitted electronically. For more information regarding copyright registration procedures, please visit <http://www.copyright.gov/>.

#### 7. IF YOU ARE GIVEN PLANS BY OTHERS, ENSURE THAT YOU HAVE THE RIGHT TO CONSTRUCT, COPY AND/OR MODIFY THOSE PLANS BEFORE USING THEM.

Owners often solicit designs from multiple architects or designers during the design and bid phases of the project, especially design-build projects. Some owners believe they have the right to share designs obtained through the design/bidding process with other competitive bidders. This can be problematic depending on the contractual relationship between the owner and the original designer. If the original designer retained all copyrights in the original design, an unsuspecting subsequent designer or contractor may infringe the copyrights of the original designer by refining or constructing a project that is substantially similar to the original design. Therefore, whenever an owner, construction manager or other party provides you with architectural plans, you should ensure that you have the right to construct copy and/or modify those plans before using them.

#### 8. IF YOU ACCEPT PLANS FROM OTHERS, INSIST ON INDEMNIFICATION FOR ANY COPYRIGHT INFRINGEMENT ARISING FROM THOSE PLANS.

As described in the previous section, multiple unforeseen consequences can occur when parties share construction plans amongst each other. Therefore, if you receive construction plans from another party and are asked to construct, modify or otherwise use those plans, you should require the party providing those plans to indemnify you for any copyright infringement claims that arise therefrom. The written indemnification

provision also should include indemnification for any other forms of intellectual property or unfair competition claims that may arise from your use of those plans and should include a duty to defend any related litigation in addition to the duty to indemnify.

**9. THE ORIGINAL ARCHITECT OR DESIGNER REMAINS THE OWNER OF ANY COPYRIGHTS IN THE ARCHITECTURAL DESIGN, EVEN IF THE CONTRACTOR OR OWNER PAID FOR THE DESIGN.**

In many construction projects, the owner, construction manager or contractor will contract with an architect or designer to design the project. Regardless of payment, if the contract does not state otherwise, the original architect or designer retains ownership of the copyrights and the purchaser merely obtains a non-exclusive license to use the plans for that particular construction project. This means that the owner and/or contractor do not necessarily have the right to use the purchased plans for any other projects and do not have the right to prevent the original designer from selling those same plans to other owners and/or contractors. Accordingly, owners and/or contractors should insist that their design contracts contain a written assignment of all copyrights and other intellectual property that the architect or designer owns in the plans to ensure that the architect or designer does not retain any intellectual property rights in the design which could create issues down the road. Alternatively, an owner or contractor should obtain written permission from the original architect or designer before reusing previously-purchased plans on other projects. If the design's uniqueness is important to the owner, it should also insist that its license be exclusive. Otherwise, an architect could resell the design to others.

**10. ENSURE THAT YOUR INSURANCE COVERS COPYRIGHT INFRINGEMENT.**

Many construction professionals mistakenly believe that they have insurance coverage for virtually any type of claim that may arise in a construction project. However, most commercial general liability insurance policies do not cover architectural copyright infringement. As briefly discussed in this article, copyright infringement litigation can be very expensive and potentially devastating to construction companies. Therefore, you should consult with your insurance agent to ensure that your policy covers architectural copyright infringement. In some instances, it may be covered by professional liability insurance. In other instances, you may be required to purchase additional coverage. In any event, it is better to be safe than sorry.

If you have any questions, please contact [Jeff Reichard](#) at (336-373-1600).