

Copyright Protection for Architectural Works

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United States copyright law protects “original works of authorship fixed in any tangible medium of expression.” This protection derives from Congress’ constitutional power “to promote the progress of science and useful arts.” For individuals, copyrights are valid for the life of the author plus seventy years. Entities are protected for ninety-five years.

Before the enactment of the Architectural Works Copyright Protection Act (“AWCPA”) in 1990, only architectural plans or drawings were copyrightable. Consequently, the construction of a building from copyrighted plans or drawings did not infringe on the copyright.

The AWCPA specifically protects architectural works built on or after December 1, 1990, and architectural works embodied in unpublished plans and drawings created before this date. An architectural work is “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. 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.” Therefore, architectural plans and drawings now are dually protected from both xerographic reproduction and reproduction by construction, and buildings are protected from reproduction by construction.

Copyrights on constructed architectural works are limited in two ways. First, copyright owners may not “prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.” Second, the copyright owner’s consent is not required before alteration or destruction of the work.

Obtaining a Copyright

A work fixed in a tangible form is automatically protected under copyright law at creation. Although not required, the author may place a copyright notice on the work, such as: Copyright © 2006 Adam T. Mow, All Rights Reserved.

While not required, authors may also register their works with the United States Copyright Office. This has advantages if an infringement claim is made: it provides proof of creation, it is required for an award of statutory damages and fees, and it allows the author to bring a federal cause of action.

An author may not claim copyright protection for a work if that work was created as part of the author’s employment. To address this concern, American Institute of Architects B141-1997, *Standard Form of Agreement Between Owner and Architect*, § 1.3.2.1, expressly provides that the architect retains the copyright in the “Instruments of Service.”

Copyright Infringement

The tests for copyright infringement all generally follow a three-part analysis. A court first determines whether a valid copyright exists. A court then looks for both the defendant’s access to the copyrighted material and whether the works are similar in their entirety. Access is defined broadly as the opportunity to view the copyrighted material. The court’s final analysis, substantial similarity, is a finer examination of similarity and compares only the copyrightable elements of the original and allegedly infringing works.

The substantial similarity analysis involves two steps. First, a court must determine what portions of the author’s work are protected by copyright. Mere ideas, concepts, and functional or

standard elements are not copyrightable components and are not part of the inquiry. The second step is to determine whether an allegedly infringing work is substantially similar to the protected elements of the original work. But substantial similarity, although an essential element of copyright infringement, is difficult to quantitatively determine. In fact, the line marking the boundary of substantial similarity from acceptable similarity often seems arbitrary. Furthermore, the definition of “substantial” varies by circumstance, with more similarity required when less creative—and therefore less protected—works are at issue. Constructed architectural works are judged not by isolated, individual elements, but by their “overall look and feel,” with substantial resemblances, not minor differences, being determinative.

Remedies available for infringement of architectural works are generally the same as those available for other forms of copyright infringement. The copyright author can recover either statutory damages or actual damages along with any profits of the infringer not factored into actual damages. Awarding of statutory damages is generally precluded unless the work is registered with the Copyright Office. A court may also impound and order the destruction of the infringing item or issue preliminary and permanent injunctive relief. Of course, destruction is unlikely for buildings due to substantial hardship and monetary loss, so monetary damages are the most likely form of relief.

The largest award for an architectural copyright case was \$5.9 million, awarded in 2005 to Hablinski+Manion Architecture. Its plans for a \$20 million Bel-Air mansion were copied and used to build a \$14 million Beverly Hills home. The jury found that the overall composition of the two homes, including the placement and size of chimneys, balconies, doors, windows, and colonnade, was almost identical.

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