

ARCHITECT TOPICS

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WATCH THAT COPYRIGHT

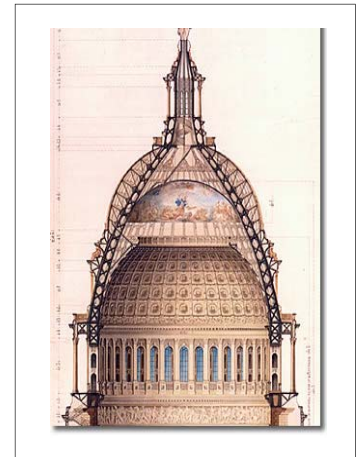
Like music and literature, architectural works enjoy explicit copyright protection thanks to the Architectural Works Copyright Act of 1990. The Act defines an “architectural work” as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” Even architectural details are protected, if they are original. Conversely, standard details are not. It is important to note, however, that only the expression of the ideas is protected. The idea, or design itself, is not.

Unfortunately, there is no bright-line test to determine when an unprotected idea is sufficiently detailed to become a protected expression of that idea. Thus, while one New York Court found that the unauthorized taking of general design elements for the New York Hospital, such as the use of truss technology to build over the highway and the means of integrating the new structure with

existing buildings was not an infringement, a different court found that use of similar details, after they were depicted on a detailed site plan, was a copyright violation.

The penalties for violation of an architectural copyright can be severe and may include an injunction against the use of the plans and damages, including the infringer’s profits. If the infringed design or structure has been registered with the Copyright Office, additional statutory damages up to an additional \$100,000 may be assessed.

Finally, it is important to realize that under the Act, the ownership of the design copyright is distinct from ownership of the building. Therefore, an architect who is commissioned to build a house for a client does not relinquish his ownership of the design. By the same token, the homeowner does not acquire the right to reproduce the design in another house.



Architectural designs enjoy copyright protection

Given the complexities of copyright law, the architect is advised to be careful about the source of his or her designs and to draft appropriate contract language covering copyright protection of the design. Copyright ownership is addressed, for example, in the AIA standard forms.

WHO NEEDS INSURANCE?

We often hear from design professionals, such as architects and engineers, that they do not purchase errors and omissions insurance because it is too costly and because they view it as a “lightning rod” for litigation.

They are right on both counts, but that is not the end of the story. Much construction litigation follows the “Casablanca Rule”, namely “round up the usual suspects”. Design professionals are clearly among the usual suspects and can expect to

be brought into expensive multi-party cases, even if they bear little or no responsibility. One benefit of professional liability insurance is that the insurance company will underwrite the legal fees which often exceed by far the professional’s potential liability.

SOME USEFUL CONTRACT PROVISIONS

AIA's standard contract forms between the Owner and the Architect (B141 and the abbreviated form, B151) have the advantage of being familiar to the construction community and to the courts. The architect should review the forms to make sure they meet the particular needs of each project.

For example, while the forms contain an arbitration provision designed to reduce the cost of resolving disputes, arbitration often has

the opposite effect for reasons too numerous to discuss here. However, for smaller disputes (under \$75,000) the American Arbitration Association has Fast Track Procedures which allow for resolution of disputes in a single day, generally without discovery. Use of this procedure should be specified.

A "limitation of liability" provision (e.g. limiting the architect's liability to the amount of his fee) would also



be an important clause, if it can be negotiated. New Jersey has found them to be valid and not in violation of the statute prohibiting indemnity of an architect who is found to be solely negligent.

LIENS ON LEASEHOLDS AND CONDOMINIUMS

Unfortunately, designing a project can turn out to be the easy part. Getting paid for your hard work is sometimes more difficult.

As a last resort, it may be necessary to file a construction lien on the project. While most architects are probably aware that they are entitled to file a construction lien against buildings under New Jersey's Construction Lien Law (NJSA 2A:44A-1 et

seq.), most do not know that this right also extends to leasehold interests. In fact, a lien can be filed against any "interest in real property".

In the case of improvements to apartments, the lien attaches only to the leasehold interest of the tenant, unless the improvements were approved by the property owner. Then a construction lien can be filed against the underlying property.

Condominiums present different problems. New Jersey's Condominium Act bars the filing of a lien against any property other than the unit for which the services were performed. Therefore, unless the work was authorized by the condominium association, care must be taken to exclude common elements from any construction lien filing.

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Johnson & Conway, LLP is a boutique law firm servicing the construction industry throughout New Jersey. Its three partners, **Geoffrey Johnson**, **John Napolitano** and **William "Mickey" Conway** have a total of 45 years of legal experience working with small to mid-sized construction professionals, owners and contractors. In addition, John Napolitano has a background in engineering

and is a licensed engineer.

We handle a wide range of matters from contract review and negotiation, corporate counsel and succession planning, employment disputes, and litigation, both complex and small before the courts and regulatory bodies.



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