

ARCHITECT TOPICS

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WATCH THAT COPYRIGHT

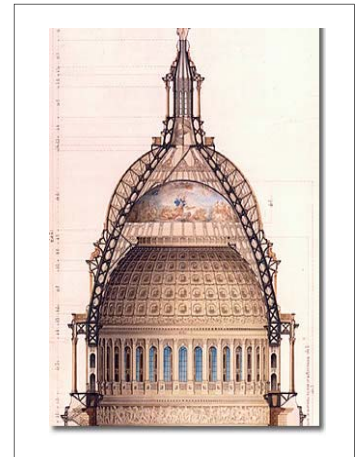
Like music and literature, architectural works enjoy explicit copyright protection thanks to the Architectural Works Copyright Act of 1990. The Act defines an “architectural work” as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, 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 York law does not permit, however, an architect to limit its liability for personal injury or property damage.

LIENS ON LEASEHOLDS, CO-OPS AND CONDOS

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 mechanic's lien on the project. While most architects are probably aware that they are entitled to file a mechanic's lien against buildings under

New York's Lien Law, most do not know that this right also extends to leasehold interests. If the design work is performed for the lessee of an apartment, for example, then a lien may be filed against the apartment lease.

However, if the apartment is a cooperative, then the tenant's interest is as a shareholder in the coopera-

tive corporation and the corporation, not the occupant of the unit, must be named as the owner in the lien filing.

Condominiums present different problems. Because the NY Real Property Law bars mechanic's liens on "common elements" without the consent of all unit owners, lien filings must take care to exclude the "common elements".

JOHNSON & CONWAY, LLP

Johnson & Conway, LLP is a boutique law firm servicing the construction industry throughout the New York Metropolitan area. 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 back-

ground 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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