

## Why an Understanding of Copyright Law is Vital for Architects

By Joseph J. Bosick, Esq.  
And J. Peter Shindel, Esq.

Most architects attempt to protect their work product and intellectual property through contract. The general practice in the industry is for the architect to retain ownership in the plans and specifications that the architect prepares. See U.S. Copyright Office, *Report of the Register of Copyrights: Copyright in Works of Architecture* (1988). The American Institute of Architects ("AIA") provides standard form agreements that satisfy this standard, and which are designed to ensure that the architect retains ownership in the architect's plans and designs as against both the owner and the contractor(s) involved in a project. See AIA Document B141-1997, Owner-Architect Agreement ¶ 1.3.2 (regarding owners); AIA Document A201-1997, General Conditions of the Contract for Construction ¶ 1.6.1 (regarding contractors).

It should be noted that the contractual rights of an architect are limited in that they cannot generally be applied against individuals or entities who are not a party to the contract. Conventional tort remedies are also frequently inapplicable. Protection falls within the domain of copyright. See, for example, Bruner & O'Connor on Construction Law § 17:85 (collecting cases).

As a general matter, where an architect employs the standard form language supplied in the AIA agreements, that language will suffice to protect his interests in his work product and bar a subsequent owner or contractor from using those plans if the architect is replaced on a particular project. This concern for protection is no small matter, as the owner may well be interested in pursuing the original design, but want to replace the original architect as a result of disputes unrelated to the design (such as, for example, the owner's supposed financial constraints). See, for example, Sparaco v. Lawler, Matusky, Skelly, Engineers, LLP, 303 F.3d 460, 462 (2d Cir. 2002).

However, in certain cases, the AIA language has been found ineffective to prevent the owner from utilizing an architect's drawings and plans outside of the original, contracted project. The court held in the case of Wright v. Tidmore, 430 S.E.2d 72 (Ga. App. 1992) that a clause in a contract between the owner and the first architect that the drawings and specifications were to remain the property of the first architect, did not prevent a second architect from preparing the plans and plans for recording by redacting certain sections of the first architect's designs and then filing them under the second architect's seal. In the Wright case the second architect prudently retained the first architect's name on all the plans as the design architect.

In Sparaco, the second architect and contractor who were found to have infringed on the first architect's copyright could not have been held liable for breach of contract, as they were not parties to the contract between the first architect and the owner. Pursuit of a tort remedy by the first architect would have been equally difficult, given that the owner had

authorized use of the designs. In such situations, an architect must rely on copyright law as his sole source of protection. The federal copyright statute protects both architectural drawings and the finished architectural work itself. 17 U.S.C. §102(a)(5) and (8).

In United States law, a hornbook is a text that gives an overview of a particular area of law. In the arena of copyright, it is considered to be "hornbook law" that fact and ideas themselves are not copyrightable. The expression of ideas is copyrightable. However, exactly where the line is drawn between an idea, on the one hand, and its expression, on the other, is a subject far too detailed for a hornbook to cover. Indeed, that "endlessly baffling" question has bedeviled the federal courts since Judge Learned Hand's famous discussion of abstractions in Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). See Sparaco, 303 F.3d at 469. As Judge Hand put it, "[n]obody has ever fixed that boundary, and nobody ever can." Nichols, 45 F.2d at 121. The courts, especially in the past decade, have struggled with the endless task of attempting to determine where to draw the line between idea and expression for architectural drawings. As Judge Hand predicted, what has emerged is not a definitive answer, but certain clear guideposts that are critical for architects, and indeed all designers, to be aware of when entering into a project.

The use of common design features in a particular drawing or plan does not constitute copyright infringement. Here are some examples of what is not copyrightable. "In and of themselves, domes, wind-towers, parapets, and arches represent ideas, not expression." Sturdza v. Utd. Arab Emirates, 281 F.3d 1287, 1297 (D.C. Cir. 2002). Also "...generalized notions of where to place functional elements..." are not copyrightable ideas. Attia v. Soc'y of N.Y. Hosp., 201 F.3d 50, 55 (2d Cir. 1999). Finally, "...the use of standard structural elements and the concept of a one-story office showroom are not copyrightable." CSM Investors, Inc. v. Everest Dev., Ltd., 840 F. Supp. 1304, 1310 (D. Minn. 1994).

It is not the case that technical drawings can achieve copyright protection only where they are sufficiently complete and advanced to support actual construction. See, for example, Sparaco, 303 F.3d at 469. Instead, a sufficiently unique *design* employing particular features will be protected by the Copyright Act. The courts that have considered the issue have recognized that the entire set of drawings and plans must be considered as a whole, "because protectable expression may arise through the ways in which artists combine even un-protectable elements." Sturdza, 281 F.3d at 1296; Sparaco, 303 F.3d at 467. Thus, for example, the particular arrangement of the un-protectable elements discussed in CSM Investors, above, was found to be "sufficiently original to be afforded copyright protection." As another example, the concept of designing a restaurant/bar area with an island or peninsula-shaped bar to bisect a seating area with booths on one side and stool seating on the other is too general to merit copyright protection itself, and where the actual designs for such a floor plan are of different dimensions and contain different seating layouts, copyright protection will not exist. See, for example, Ale House Mgmt., Inc. v. Raleigh Ale House, Inc., 281 F.3d 137, 142-44 (4th Cir. 2000).

However, the more specific a particular plan or set of drawings is, the more likely it will be amenable to copyright protection. *See Sparaco*, 303 F.3d at 468. And, even where specific elements contain certain differences, if the "overall look and feel" of the designs is substantially similar, copyright protection will obtain. *See Sturdza*, 281 F.3d at 1298 (reversing grant of summary judgment where, despite differences in individual design elements, the "overall look and feel" of two designs was sufficiently similar for a jury to find copyright infringement).

Thus, in order to protect their work product, and in addition to the types of contractual protections afforded by the AIA form agreements, architects must be cognizant of the interaction of copyright law with their profession. In particular, the more specific and detailed the plans they create are, the more likely the architect is to be protected in the event of future infringement by a contractor or rival architect. To the extent that the architect has a particular idea or vision for a project, that vision should be captured in as detailed a plan or drawing as possible, and should be marked with an appropriate copyright notice including the "©" symbol, the author, and the date the drawing was completed. To the extent that a design expresses the manner in which to capitalize on an idea, copyright law will provide protection.

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Joe Bosick is the Chair and Pete Shindel is a member of the Construction Practice Consortium at the Pietragallo law firm ([www.pietragallo.com](http://www.pietragallo.com)) with offices located in PA, O, and WV. For questions, you are welcome to contact Joe Bosick ([JJB@Pietragallo.com](mailto:JJB@Pietragallo.com)), Pete Shindel ([JPS@Pietragallo.com](mailto:JPS@Pietragallo.com)), or members of the firm's Intellectual Property Practice Group. You are also welcome to write Joe Bosick at One Oxford Centre, 38<sup>th</sup> Floor, 301 Grant Street, Pittsburgh, PA 15219