



## GUEST ESSAYS

### **Copyright and the Design Professional: An Overview**

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#### ***To copyright or not to copyright; that is the question?***

You have just prepared a set of construction documents under a standard American Institute of Architects (AIA) Form of Agreement and you are about ready to turn the documents over to the owner for final review prior to submitting them to the Building Department. Suddenly it dawns on you that the AIA Standard Form of Agreement speaks to the issue of copyright, but you haven't the foggiest idea of just what a copyright is and how to protect your rights with regard to that copyright.

If you have ever been in this situation, you are not alone. While the concept of "copyright" is frequently discussed by and amongst design professionals and referred to in the Standard Forms of Agreement of organizations such as the AIA, most design professionals have very little understanding of their rights under the copyright laws of the United States.

This article will provide a thumbnail sketch of just what a copyright is as well as what it is not and how to best protect your rights to your copyright.

#### ***What is a copyright?***

A copyright is the right to control the display, publication, reproduction and creation of derivative works of original works of authorship which are fixed in a tangible medium. This is somewhat of an oversimplification of the concept, but it will suffice for this article. The U.S. Constitution speaks to the subject at Article 1, Section 8 as follows:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

#### ***How do I protect a copyright?***

Copyrights spring into existence the moment an original work of creative authorship is fixed in a tangible medium of expression. Although a copyright may be registered to give notice to the world of the rights of the copyright owner, registration is not necessary and nothing further needs be done to obtain ownership of the copyright. Copyright is initially owned by the author of the design, unless the individual author either produced the works in the course and scope of his employment or pursuant to a written agreement that the work is a "work-made-for hire," in which case the copyright belongs to the employer. A copyright may be assigned or transferred just like other types of property.

There has been some dispute over the years as to the scope of copyrights owned by architects in their drawings and whether the construction of structures that are created from them was an infringement. This has been clarified by Congress and since 1990 it has been clear that a designer holds a copyright to their design drawings and that an infringement occurs by constructing a building in compliance with those design drawings.

Since March 1, 1989, your drawings do not even need to include the familiar © in your drawings. However, the better practice is to place the © notation somewhere on your written documents or otherwise specifically state on the documents that you are claiming a copyright to those drawings. Inclusion of the copyright notice will entitle you to statutory damages, in lieu of actual damages, and attorneys' fees if you have to sue for infringement.

### ***Do I need to register my copyright with anyone?***

While you do not waive or lose your copyright by failing to register that copyright with the United States Copyright office, the better practice with regard to any significant work prepared by you as a design professional would be to appropriately register it with the Library of Congress. Registration is a pre-requisite to filing suit for copyright infringement. Registration within certain time constraints of first publication and any infringement are also pre-requisites to the right to recover statutory damages, in lieu of actual damages, and attorneys fees if you have to sue for infringement.

### ***Does this mean that every set of drawings that I produce in my office should go through the process of actually copyrighting them?***

Practically speaking that is neither necessary, nor realistic. A final set of drawings, or the permit set would be a good set to register. The point is to register a sufficiently detailed set so that any infringer making only slight variations will have infringed by having made a "derivative work."

### ***How do I register my copyright?***

You may be surprised to know that is relatively simple and painless. A good start is to go to a website that the Library of Congress has set up at [www.copyright.gov](http://www.copyright.gov) that is both informative and extremely easy to use. You can download the appropriate applications depending upon the type of material you are attempting to register, and it only costs \$30.00. Indeed, if you go to this website you might learn a great deal by simply browsing some of the particulars concerning registering your work product with the Library of Congress.

### ***Do I actually receive something called a "copyright"?***

No, you are simply registering your materials at the Library of Congress which creates the presumption that you are entitled to that copyright. In essence, you are simply registering your drawings which is intended to put everyone on notice that you created the drawings and own the copyright. You do not receive any actual piece of paper or other document which states "**COPYRIGHT**", but you will receive an acknowledgment that you have registered the materials.

Since your right to the copyright attaches as soon as you prepare the work. All a registration of your copyright does is create a presumption in the law that it was you that prepared the original work which may go a long way toward asserting your rights should there be an infringement action later on.

For example, if you create a work and fail to register it and thereafter someone steals your work and registers it themselves, you may have a bit tougher time in prevailing in a court of law to demonstrate that your material was stolen. Essentially, the bad guy will have a leg-up because he or she registered first.

More significantly, a registration entitles you to sue an infringer who uses your plans to build the structure without your permission, a more likely scenario, and to seek additional remedies such as statutory damages, in lieu of actual damages, and attorneys fees and enhanced damages up to \$150,000 per infringement, if you can prove the infringement was willful. The registration and use of the copyright notice, © , goes along way towards proving that the infringement was not innocent.

### ***How long does my copyright last?***

With regard to architectural works created on or after December 1, 1990, the copyright would last from the date the materials were created throughout the remaining life span of the last surviving author (it assumes that there was more than one author) plus an additional 50 years. A copyright owned by a corporation, such as a "work-made-for hire" or by an employee in the course and scope of his employment, exists for 75 years. There are a number of anomalies which exist in the event the copyrighted materials were prepared prior to January 1, 1978 but we need not get bogged down in that type of detail for purposes of this discussion.

### ***Can a newscast use my copyrighted materials without my permission?***

The doctrine of "Fair Use" allows the use of copyrighted materials for teaching, news reporting, scholarship and research, etc. While there is no rigid test, were the news reporter to use some of your copyrighted materials for legitimate news reporting, then the news agency would have a fairly good argument that it could use the materials without your permission under the "Fair Use" doctrine.

### ***Now that I have my copyright . . . so what?***

The principle reason for registering your materials is to protect your rights to them should an infringement action become necessary. Because copyright is a creature of federal law, any action must be brought in federal district court. These courts have exclusive original jurisdiction over all civil actions concerning copyright. Should you need to pursue an infringement action against another party, there is the added benefit of being able to pursue recovery of reasonable attorneys fees together with actual damages.

The court may also award, in its discretion, damages in an amount not less than \$500.00 and not more than \$20,000.00 should it be inclined to do so. If the court finds that the infringement was "willful" the court can award up to \$150,000.00 in additional damages. Should the infringer be able to demonstrate that he or she was not aware that there was any copyright violation, the court may award additional damages equal to an amount of not less than \$200.00.

In certain rare instances such as the filing of a false registration, the U.S. attorney might get involved and the infringer could be fined up to \$10,000.00 and imprisoned for not more than 1 year or both.

### ***How long do I have to file a lawsuit if I find that someone is infringing?***

The civil action must be filed in federal court within 3 years after the claim accrues.



## GUEST ESSAYS

### ***How do I deal with owners that want me to give up my ownership in the documents?***

This is frequently a problem, especially with public entities. Under federal law, the author of the documents must sign a written agreement specifically stating that it was the author's intention to transfer his or her "copyright" interest. An agreement to simply "transfer ownership in the drawings" is not sufficient to waive any copyright interest that the design professional has in the design. However, the better practice is to avoid executing agreements where ownership in the drawings is transferred and rather agree to allow the owner a limited one-time license to use the drawings to construct the building or the structure at issue.

### ***Now that I know what a copyright is, shouldn't I copyright all of the plans prepared by my office?***

That choice is ultimately yours. Since you technically already have a copyright interest in any plans that you prepare whether or not they are actually registered with the Library of Congress, you probably need not register every set of drawings coming out of your office. However, you should consult with your own attorney and take into consideration the type of project at issue, the uniqueness of the project, etc. in making an additional determination as to whether you should seek to register a copyright as to particular drawings at issue.

In some cases, you may want to register drawings for architectural elements separately if there is a likelihood that those elements will be copied or infringed. An infringement of the design plan for an entire structure or project occurs when there is a substantial taking from those plans. An infringer who willfully copies only a few architectural elements may get away with it if the court finds it was not a substantial taking of the entire design plans which were registered.

### ***How do I register my plans?***

If you are registering plans you need to use form VA which can be downloaded from the United States Copyright office website at [www.copyright.gov](http://www.copyright.gov).

### ***How do I register my specifications?***

You can download form TX from the same website making registration a fairly simple and straightforward process.

### ***Can I register a single window detail or construction process?***

A construction "process" is not copyrightable, though it may be patentable. A single window detail may be copyrightable if it is a creative original; in other words sufficiently unique and different from prior designs.

Federal law states with regard to "architectural work" that one can copyright the plans or drawings, but individual "standard features" are not subject to a copyright. Interestingly, certain non-habitable structures are not subject to copyright. These include non-habitable structures such as bridges or dams which are not "buildings" under federal law and therefore are unprotected.



## GUEST ESSAYS

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**NOTE:** *This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.*