

Copyright Issue-Spotting for Real Estate Attorneys

Copyright is a complex area of intellectual property law, where ownership, validity and permissible use of third-party materials often are disputed. Real estate development projects can depend upon getting the right legal advice regarding copyrights.

Mitch Tuchman has extensive experience guiding businesses and individuals through a range of copyright matters. From time to time real estate attorneys are likely to encounter copyright issues respecting architectural plans and structures. The following are some questions that may help you assist your clients:

Does the buyer of real property acquire any rights in plans prepared by the seller's architect? Typically no. Plans do not run with the land. If the architect assigned rights to the seller or provided for use by the seller's successors, the buyer may benefit however. Be on the lookout for conflicting claims of copyright ownership respecting architectural plans and mechanical drawings. Other variables include a documented chain of title; the intent of the original parties; and the scope of copyright claims.

Does the design of a new development have to look different from all earlier developments? Not necessarily. The relevant issues include the scope of copyrightable subject matter in the plans and/or constructed buildings, the presence of merely functional aspects of design, the protectibility of well-established architectural genres, and practical "work-arounds."

Can plans be reused for other projects? Yes, provided proper steps are taken. When a developer anticipates multiple iterations of architectural works—think, fast food restaurants—accommodative terms should be incorporated into applicable agreements with architectural and engineering firms. Such terms should satisfy both the reasonable interest of architects and engineers in their work products as well as the need for developers to grow their businesses. Pay close attention to the continuity of rights when the developer forms new corporate entities with respect to each of its development.

Must the architect or developer register its copyrights? No. Copyright registration is not mandatory, but it is advisable because federal courts cannot exercise jurisdiction in matters involving unregistered copyrights. When the owner of an architectural plan or work prepares an application to register copyrightable subject matter, questions will arise as to the nature of the claim, what constitutes an acceptable specimen for inclusion with the application and whether a request for expedited processing is justified.

What if someone copies a registered work? Whether a developer seeks to enforce a registered copyright or to defend against a claim of infringement, numerous preliminary issues must be considered. These include the alleged infringer's access, if any, to the copied work; applicable standards for assessing similarity between the works at issue; and the law of the jurisdiction.

Does filing plans for building permits undermine copyright? No, but it can create unintended consequences of public access to architectural plans. This calls into question the meaning of "first publication" and the timing of applications to register copyrights.

If you have any questions, please contact:

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